Supreme Court, U.S.
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No. 06-675

In The

Supreme Court of the United States

LAUREN J. PAULSON,

Petitioner,

v.

OREGON STATE BAR and
THE SUPREME COURT OF OREGON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On de novo review, is it a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution if no member of the Supreme Court of Oregon actually examines the record nor the arguments in the briefs of all the parties when the Court sanction is penal in nature (i.e., loss of one's right to work in one's profession for six months)?

Because Oregon's Constitution does not have a due process clause, Paulson's only source of protection is the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES

Paulson is a resident of the State of Oregon, a Member of the Oregon State Bar since 1973, and a duly elected Member of the Oregon State Bar Board of Governors in 2002. He was suspended from the Oregon State Bar Board of Governors on October 14, 2004 due to the pendency of this disciplinary case by a new Bar rule (Bylaw 18.6) enacted on that date.

William Carter is the past President of the Oregon State Bar for 2004. Karen Garst is the Executive Director and the chief administrator for the Oregon State Bar. George Riemer was the General Counsel for the Oregon State Bar. Dennis Rawlinson is the current President and Nena Cook is the past President for 2005 of the Oregon State Bar. Lisa LeSage is a past member of the Oregon State Bar Board of Governors (BOG).

Jeff Sapiro is the Oregon State Bar Disciplinary Counsel. Sapiro wears three hats under Oregon's disciplinary system. He is Disciplinary Counsel, i.e., the prosecutor. He is also, by Board Bylaw, Counsel to the Grand Jury of the disciplinary system, which in Oregon is called the State Professional Responsibility Board (SPRB). He also formally participates in the selection of the Trial Panel judges through the BOG Appointments Committee even though the Oregon statute requires that the Oregon Supreme Court appoint the Trial Panel members.

> "The Supreme Court shall appoint a disciplinary board to hear formal charges against members of the bar."
>
> ORS 9.534

PARTIES – Continued

Paulson served on the BOG Appointments Committee and observed Sapiro's participation in the selection of Disciplinary Board judges.

Martha Hicks is the Assistant Disciplinary Counsel for the Oregon State Bar on this specific Nutt/Gensman case and appeared before the Trial Panel. Mary Cooper is the Assistant Disciplinary Counsel who prepared the appellate briefs in this matter.

At all times mentioned herein the Oregon State Bar is a public corporation, a political subdivision and agency of the State of Oregon and an instrumentality of the Oregon Supreme Court. The Hon. Wallace Carson is immediate past Chief Justice of the Oregon Supreme Court. The Hon. Paul J. De Muniz is the current Chief Justice of the Oregon Supreme Court.

Mark Gensman is one of several defendants in the underlying Multnomah County case.

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OPINION BELOW

The Oregon Supreme Court rendered its written Opinion in this lawyer disciplinary case on June 8, 2006 (App-1). Lauren Paulson (Paulson) filed his Petition for Reconsideration (App-84) of that Opinion which the Oregon Supreme Court denied without an opinion on August 16, 2006 (App-83).

COMPANION CASES

Following Paulson's removal from BOG, he filed, inter alia, a civil rights complaint in the federal District of Oregon in 2004 entitled *Paulson v. Carter, et al.* (Carter), Case #CV04-1501KI. Summary judgment was granted to the Oregon State Bar (OSB) in 2006 and Paulson has appealed the District Court's decision to the Court of Appeals of the Ninth Circuit (Case #06-35260).

The case underlying this disciplinary matter is *Nutt v. Gensman, et al.*, Multnomah County Circuit Court Case #9804-03034 (Nutt/Gensman). Paulson represented Jerry and Phyllis Nutt in that litigation. Gensman made multiple disciplinary complaints, that are the subject of the instant case, during the course of the Multnomah County proceedings.

JURISDICTION

This Petition for a Writ of Certiorari is filed within 90 days after entry of the state court of last resort's judgment denying discretionary review (App-83).

FEDERAL QUESTION INVOLVED

The federal question involved in this case is the "due process" clause of the Fifth and the Fourteenth Amendments to the United States Constitution, the latter of which provides that no state shall "deprive any person of life, liberty, or property without due process of law."

STATEMENT OF FACTS

A. Historical Facts – Because so many facts of the instant case are inseparably intertwined with the Companion Cases, some of those historical facts are included here.

The Oregon State Bar is a public corporation. Its 14,000 members are its shareholders. It's House of Delegates is its legislature (HOD). Its Board of Governors (BOG) is the executive branch and the Disciplinary Board the Bar's judiciary for disciplinary matters.

From his admission to the Oregon State Bar in 1973 until 1990, Paulson had no Bar ethics complaints. During these years he was working as a lawyer for various insurance companies around the United States as a claims attorney and claims counsel. He worked in Oregon, California, Tennessee, Ohio, New Jersey and on Wall Street in New York City, rising to a senior officer position with Atlantic Insurance Company, the insurance company that insured the Titanic in 1912. Since becoming a private practitioner of law in the State of Oregon in 1987, he has had over 23 Oregon State Bar ethics complaints – all but one dismissed without merit until 2001. Because each of these ethics complaints took the Oregon State Bar and Jeff

Sapiro's Disciplinary Department on an average of over seven months to investigate, Paulson has been under Oregon State Bar investigation for the last 14 years he has been in private practice in Oregon including to the present except for a short window of time in 1996. Beginning with his first complaint, but, in particular after 1998, Paulson began questioning whether the Oregon State Bar Disciplinary Counsel's office is properly administered, whether there is bias in the system, and whether retaliation occurs against certain lawyers when they complain. Paulson had identified that specious ethics complaints come from three sources through his own independent study of the matter: clients who don't want to pay their bill; opposing parties (Gensman); and clients' boyfriends.

In the *Jerry Nutt et al. v. Gensman, et al.*, Multnomah County Circuit Court Case #9804-03034 the Nutts, represented by Paulson herein, sued Gensman, inter alia, under The Federal Truth-in-Lending Act. Gensman filed several bar ethics complaints against Paulson during the course of the Nutt litigation against him. The 1998 ethics complaint by Gensman was summarily dismissed by Ms. Cooper. Subsequent letters to the Bar by Gensman complaining about being sued were also summarily dismissed. Gensman's letter-writing campaign continued until March 2000 when the letters came to the attention of Sapiro who was unaware of the prior complaints and dismissals. Sapiro's handling of the matter languished without action for a year. Paulson pressed Sapiro for action on November 5, 2001 in this matter without result. Finally, Paulson filed a formal ethics complaint against Sapiro for Neglect of Legal Matter under DR 6-101B.

Meanwhile, Paulson also formally asked to be a part of the Disciplinary Task Force which was against the

wishes of the Oregon State Bar. The Bar was asked by the Oregon State Bar House of Delegates, of which Paulson was a delegate, to look into the Oregon State Bar Disciplinary Counsel's entire activities and methods including appropriate time lines for investigation and processing of disciplinary matters. The Task Force was also asked to look into bias of the system among other things. These two events, the HOD vote to examine Sapiro's office and the proceedings of Disciplinary Task force, occurred in October and December of 2001. In January 2002, Sapiro's investigation of the Gensman matter then took on new life in apparent retaliation for Paulson's complaint against Sapiro. The subsequent investigation in 2002 took another eight months and resulted in a 66-page investigative report and five ethical charges being filed against Paulson by a newly hired investigator, Wayne Appleman, on behalf of the OSB.

The Nutt litigation involved complex litigation. Appleman has never practiced law in the State Courts of Oregon where the Nutt matter was litigated nor practiced law at all. Even though said investigation had been assigned to the local professional responsibility committee which normally supervises these investigations, Sapiro took a personal interest in this investigation and supervised it in all respects. Federal District Court Judge Garr King allowed that this was suspicious in his dispositive written decision of January 9, 2005 in the companion case. Paulson was only charged with one of the five charges recommended by Appleman to the SPRB and that was under the catch-all ethical allegation of 'acts prejudicial to the administration of justice' (which, if we were to be intellectually honest, could include about anything a lawyer does). This is the disciplinary issue that resulted in

the present suspension (there are actually two suspensions – one when BOG passed the new rule, Bylaw 18.6, which suspended Paulson from serving on BOG in 2004. There is also the instant suspension from the Bar due to Oregon Supreme Court's decisions in 2006.)

Many ameliorative changes occurred as a result of the Disciplinary Task Force recommendations including the removal of disciplinary intake matters from Sapiro. Intake was transferred to a new Client Assistance Office reporting to the General Counsel of the Bar.

Letters by the members of the Oregon State Bar to the Disciplinary Task Force in 2002 also alleged a pattern of retaliation by the disciplinary counsel's office against those bar members by Sapiro and these 46 letters (including one by past Bar President in 2003, Charlie Williamson) have been made part of the record in the companion case of *Paulson v. Carter*.

On October 18, 2002, Paulson was duly elected by the Members of the Oregon State Bar to BOG by a vote of the lawyers in Region Four which is made up of four Oregon Counties. Paulson's term of office for BOG commenced on January 1, 2003 and was for a four-year term.

Coincidentully, Sapiro filed the Gensman formal bar complaint on November 16, 2002, the same day Paulson was sworn in to the BOG.

In February 2003, Paulson inaugurated a Region Four newsletter. This publication was written by Paulson in his official capacity as a BOG Member in compliance with Oregon State Bar Bylaw Article 2.1(D) which states:

> "Each lawyer-board member represents a geographic constituency. As a representative, a lawyer-board member is expected to communicate with constituents about board actions and issues and to represent constituent viewpoints to the Board."

Moreover, Paulson sought constituents' viewpoints by asking for specific Region Four feedback on specific questions in each quarterly newslett r. Carter, Garst and other persons expressed concern that the feedback from Region Four constituents could not be controlled by BOG and they needed to enact a rule to curtail Paulson's newsletter.

On October 21, 2003 William Carter wrote an e-mail to Garst that if Paulson was going to be the ' . . . crisis of his presidency, lets get on with it' (App-140). Carter's documented, 'back channel' written campaign against Paulson began formally in October 2003 even before he became President of the Bar.

On January 13, 2004, Garst e-mailed Nena Cook that she was going to ask Sapiro to assign a **special investigator** to Paulson regarding his disciplinary matters (App-142). Lyn Bey-Roode became that special investigator.

On April 20, 2004, Carter wrote to Garst: "I don't think it would be unreasonable to advise prominent members of the bar in his Region 4 what he is up to, in order that they can consider what, if anything, they want to do about it. I don't think we can sit by and let him disrupt the bar. . . ." From April, 2004 until October, 2004 there are almost daily and certainly weekly e-mail communications about Paulson by Garst, Riemer, Carter, Cook and Sapiro.

On April 21, 2004, Carter, the Oregon State Bar President, arranged an ex parte contact with Chief Justice

of the Oregon Supreme Court, Wallace Carson, to discuss Paulson's disciplinary matter on Gensman. Neither Carter nor Justice Carson advised Paulson about this ex parte contact. Paulson only found out about the improper contact when taking the deposition of Garst who revealed it. Carter and Justice Carson have now both formally and in writing confirmed that this improper contact occurred on this disciplinary matter. Justice Carson subsequently recused himself from this case, but the damage has been done. (App-136).

In his position as Board of Governor for Region Four, Paulson was also the Vice Chair of the Oregon State Bar Budget and Finance Committee. On May 7, 2004 Paulson learned that Carter and Garst were exploring the purchase of The Living Enrichment Center (LEC) property on behalf of the Oregon State Bar for a new bar center. Garst was a congregation member of the insolvent LEC organization and was also owed $22,000 by the LEC or its affiliates. Paulson, through his memo dated May 15, 2004, "blew the whistle" on this improper and unauthorized proposed purchase. Subsequently, the sale did not proceed, however, the equity-owner was subsequently found guilty in Oregon federal court of money laundering $10 million from the congregants of which Garst was a member and a creditor.

On June 3, 2004, Carter's e-mail asked Garst to compile an 'executive summary' listing all Lauren's alleged counterproductive behavior to be used at the next BOG meeting.

On July 7, 2004, in response to Paulson's Open Records request on this case, Garst wrote Paulson a letter

and stated, "There aren't any letters or memos back and forth between Bill (Carter) and me."

On August 4, 2004, Garst e-mailed Carter asking him to call her at her home regarding the Motion to Dismiss Paulson made in this case.

In August of 2004, Carter, Garst, LeSage and others decided to formally attack Paulson by the shibboleth that having a bar complaint pending against him created a conflict of interest such that he could not serve on BOG. This position is refuted by BOG Bylaw 2.6 which articulates clearly what constitutes an actual conflict of interest while serving on BOG. An extant bar complaint is not an actual conflict of interest under the rule.

Carter, Garst, and LeSage, published in an official Oregon State Bar publication "Bar Leader Communicator" in August of 2004 an article defamatory to Paulson, to-wit:

> "Board Member Lisa LeSage expressed a number of concerns about the conduct of Mr. Paulson as a board member including that Mr. Paulson had an actual conflict of interest in serving on the board while making allegations against board members and staff in his pending disciplinary proceeding."

Paulson requested a retraction in accordance with ORS 31.215 and no retraction was made. Never before had a BOG member been openly criticized in a formal Bar publication.

Sometime prior to August 13, 2004, and reported in the OSB BOG minutes of that date, Rawlinson discussed this personal disciplinary case of Paulson's with the Honorable Douglas Beckman, Multnomah County Circuit Court Judge, in another ex parte judicial contact. The

Nutt/Gensman matter had been pending before Judge Beckman during the original proceedings, and Judge Beckman was a witness in Paulson's personal disciplinary case. This ex parte discussion with Rawlinson and Judge Beckman was not disclosed to Paulson nor the Trial Panel by Judge Beckman, but came out in their subsequent testimony in the companion case.

September of 2004 spawned two events. BOG drafted new rule, Bylaw 18.6, which removed any BOG member (Paulson) with a pending disciplinary complaint from the Board of Governors. (Paulson asserts that Bylaw 18.6 is an illegal Bill of Attainder in the companion case). The Gensman disciplinary complaint against Paulson that had been pending since 1998 was scheduled for the Trial Panel that month.

The Trial Panel rendered its verdict in April, 2005. The Oregon Supreme Court rendered its verdict in June 2006 (App-1).

B. Current Facts –

- Because there were so many stark factual errors in the Oregon Supreme Court's Opinion of June 8, 2006, Paulson wrote to the new Chief Justice of the Oregon Supreme Court, Paul J. De Muniz, on June 19, 2006, asking, among other things, if the Supreme Court would certify " . . . that at least one justice of the Supreme Court of Oregon has read the entire record and all the briefs in this case which resulted in the decision of June 8, 2006." (App-144). There was no response.

- On July 17, 2006, Paulson wrote to the Hon. Paul J. De Muniz asking for a certified copy

of the entire record in the Gensman/Nutt disciplinary case to send to the Ninth Circuit in the *Paulson v. Carter* matter so they could take judicial notice of this disciplinary case which is also a component of the issues in the federal case and for this appeal (App-114).

- The Oregon Supreme Court responded on August 9, 2006 (App-116) advising Paulson of the costs connected with the request and these matters were confirmed by telephone. Paulson wrote back and affirmed he would pay in advance for costs incurred (App-118).

- On August 16, 2006, the Oregon Supreme Court denied Paulson's Petition for Reconsideration without opinion and sent the entire record to the Oregon State Bar (App-84).

- On August 21, 2006, because there had been no response to his letter of June 19, 2006, Paulson wrote to each member of the 7-member Oregon Supreme Court individually inquiring whether they read the record in the Paulson case (App-119). There was no response to this letter from any Oregon Supreme Court justice.

- On the same date, August 21, 2006, Paulson wrote to the Records Section of the Oregon Supreme Court to ask if any member of the Oregon Supreme Court requested access to the record in the Paulson disciplinary matter (App-125). There was no response.

- On August 29, 2006, the Oregon Supreme Court advised it had sent the entire record back to the Oregon State Bar on August 16,

2006 without copying the intact record as requested by Paulson and as agreed to by the Oregon Supreme Court staff letter of August 9, 2006 (App-127).

- Paulson wrote to each member of the Oregon Supreme Court, summarizing the above sequence on September 1, 2006 and asked each Oregon Supreme Court justice individually if they had read the record in this case (App-129).

- The reply came from James W. Nass, Appellate Legal Counsel, on September 28, 2006 (App-131) correctly identifying Paulson's question:

"You have asked, in varying forms, whether and to what extent one or more justices of the Supreme Court reviewed the entire record before initially deciding this case on the merits. You also have asked whether your petition for reconsideration was read in its entirety."

"... the court considers the case consistent with its review authority.", was the only answer from the Oregon Supreme Court. (Emphasis supplied)

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS A MOST COMPELLING UNANSWERED QUESTION OF VITAL IMPORTANCE TO THE BENCH, THE BAR AND THE PUBLIC. DOES "DUE PROCESS" REQUIRE THE JUDICIARY TO AFFIRM WHETHER OR NOT THEY HAVE ACTUALLY EXAMINED THE RECORD, WHEN RULING ON DE NOVO REVIEW, WHERE, AS IN THIS CASE, THE SANCTION IS PENAL, i.e., THERE IS THE LOSS OF A RIGHT TO EARN A LIVING AND THE POSSIBLE DESTRUCTION OF A PERSON'S LEGAL CAREER?

Paulson here presents three sub-arguments on this issue.

A. What is due process as applicable here.

B. How the Supreme Court of Oregon failed here.

C. Why this Court should accept this case.

A. What is due process as applicable here: There is no "due process" clause in the Oregon Constitution, so any analysis of what went wrong in this case must be made under federal law. [See, Hans Linde, *Without Due Process, Unconstitutional Law in Oregon,* 49 Oregon Law Review 125, 135-138 (1970)].

The component of due process missing here is the right to be heard. "The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society." *Wisconsin v. Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). Under that principle, judgment can only be entered after trial with all parties afforded the right to be heard. De novo review,

which is here mandatory under Oregon law on disciplinary cases reviewed by the Oregon Supreme Court, requires a trial anew upon the record. That did not happen here because no Oregon Supreme Court justice examined the record anew as required under Oregon law. Thus, Paulson was denied due process by being denied the full right to be heard under the strictures of Oregon law and the Fourteenth Amendment. The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his profession. The purpose of such requirement is not only to ensure that the abstract notion of fair play took place, but more particularly, it is to protect the individual's property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of that property. *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, 10 U.C.C.R.S. 913, rev. den., 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177 (1972). Moreover, the right to be heard must be meaningful. If the reviewing court shirks their duty, a meaningful right to be heard is missing. Due process cannot rest on the will or caprice of others or on the discretion of judges who are conferred the responsibility to make the decision. A person is not thus protected of his constitutional rights. "The trouble with realism as a source of legal premises, with the view that what courts really do is the law, is that it does not serve well to tell judges what they ought to do." *Linde* at 131. Here, no member of the Oregon Supreme Court will say whether any one of them has examined the entire record on de novo review notwithstanding being asked three times in writing. The bench, the bar and the public have a right to know if they have shirked their duty.

The right to be heard requires an orderly proceeding, adapted to the nature of the case in which the person to be affected has an opportunity to defend, enforce, and protect his rights. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 77 L. Ed. 1265, 53 S. Ct. 620 (1933). The hearing must provide a real test. As Paulson pointed out in his Petition for Reconsideration to the Oregon Supreme Court (App-84), a close reading of the respective trial memorandums and briefing documents reveals that the Oregon Supreme Court's Opinion is drawn solely from the Bar's trial memo (App-28) and Respondent's brief in the within matter (App-147); nothing is drawn from Paulson's materials. No one can dispute one party's documents can be superlative and the other's desultory, but that does not mean that the sad offering can be ignored altogether.

Further, it must not be forgotten that in the underlying case (*Nutt v. Gensman, et al.*), Paulson, on behalf of the Nutts, also asked the Oregon Supreme Court in 2000 whether any justice of that court examined the mandamus materials of over 300 pages submitted and ruled on by that court in one day. The response was then as here – the Oregon Supreme Court would not answer that query (App-139).

Any significant taking is within the purview of the due process clause. The taking here is one's right to earn a living and the loss of one's reputation. The latter exacerbates the former. The federal source of all "due process" issues is the Fourteenth Amendment's command that "No state shall . . . deprive any person of life, liberty, or property, without due process of law"; Whether this command has been violated depends on what the state has finally done. So, if there is any deprivation to Paulson of liberty,

or property, without due process of law, there is a claim under the Fourteenth Amendment.

What is due process? The power of each state to act through their courts or legislature comes from the inherent and reserved right of the people of that state to make their own law and to alter such laws as they choose. The Fourteenth Amendment serves as a check on the power of the state when enacting those laws or altering those laws. Consistent with the limitation on the power of the federal government through the Fifth Amendment, the state through the Fourteenth Amendment must not deprive their citizens of life, liberty or property when acting through their governmental entities. The due process clause of the Fifth Amendment, which was later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. This is the liberty preserved from deprivation without due process including the right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. In *Graham v. Wright*, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). This principle was contained in the Magna Charta as part of ancient English liberties and stated: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." *Paulson v. Portland*, 16 Or. 450, 19 P. 450, aff'd, 149 U.S. 30, 37 L. Ed. 637, 13 S. Ct. 750 (1893). The purpose of this rule was to secure the person *against the arbitrary action of the Crown and to place him* (sic) *under the protection of*

the law. Dent v. West Virginia, 129 U.S. 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889).

It is settled beyond all doubt that the principle of due process as stated above came from England to America as part of the common law and as a fundamental rule of our judicial system. 16A Am. Jur. 2d 954-5, Constitutional Law §805. The very essence of our system of ordered justice is due process of law. Neither the right to own property nor to have the freedoms to speak and earn a living could exist without due process. It is the basic and essential term of the social compact which cloaks the individual with the security of certain rights and limits the powers of the state in the taking from that individual those integrated or segregated rights. The requirement of due process requires more than mere enforcement of the law, but requires this Court to look at the entire process and all steps that led to the Oregon Supreme Court's decision including looking behind the actions of the Oregon Supreme Court to examine their authority to rule in conjunction with Paulson's legal rights asserted in the overall proceeding. *State v. Henry*, 37 N.M. 536, 25 Pa. Cal. 2d 204 (1938). The term "law" as used in this guarantee embraces all the legal and equitable rules applicable to the situation. There must be authority to ignore seven legal arguments raised by Paulson in his pleading, briefs and Petition for Reconsideration (due process, equal protection, reprisal, free speech, recusal, prosecutorial misconduct, and de novo review). So, the Oregon Supreme Court must also reveal their authority in the law to avoid addressing Paulson's manifold arguments other than:

> "As an initial matter, the accused challenges a number of the Bar's factual assertions or otherwise responds to those assertions. We have

> reviewed all the accused's specific *arguments* (emphasis supplied) in that regard and conclude that we need not address those arguments. . . ." (Opinion, App-16).

Where in the law does the judiciary have the authority to ignore substantive arguments by a party, particularly the party to be disenfranchised? The fundamental guaranty of due process is absolute and not merely relative. The guaranty of due process depends on the nature of the right affected, the degree of danger caused by the proscribed activity and the availability of prompt remedial measures. It further depends on the power of the government being exercised and the purpose being accomplished. If the proceeding is found to be suitable in the special case, it will be found to accommodate due process, but if, on the other hand, it is found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. 16A Am. Jur. 2d 959, Constitutional Law §807. It is well known in Oregon that the Oregon Supreme Court abhors having to deal with ballot title cases and attorney disciplinary cases. That the Oregon Supreme Court sought to avoid having to participate in disciplinary cases became manifest in the Disciplinary Task Force proceedings of which Paulson was an active participant. A judge, or in this case an Oregon Supreme Court justice, on de novo review; the standard of review required in disciplinary cases, has an absolute duty to read the entire record, not merely conduct a relative examination of certain portions of the record which clearly connotes the arbitrary. How does a judge know what parts of the record don't need judicial attention?

If due process must be understood to mean law in the regular course of administration through courts of justice

according to regular rules and processes which have been established for the protection of private rights, then the public must have access to those rules. The Oregon Court of Appeals has internal rules, so presumably one could determine whether any member of the Oregon Court of Appeals has read the record and considered the arguments of the parties as required by those rules. The Oregon Supreme Court does not have internal rules (App-134). Thus, there is no way to know what regular processes the Oregon Supreme Court uses on reviewing matters de novo as opposed to reviewing cases where the issue is an error at law. As Daniel Webster pointed out in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 L. Ed. 629 (1819), due process of law means a law which hears before it condemns. While it is true that Paulson had a hearing before a Trial Panel, their judgment was benign compared to the Oregon Supreme Court's judgment of condemnation. Instead, the Oregon Supreme Court remanufactured the Oregon State Bar's putative facts found in the Bar's Respondent's Brief (App-147) which gave genesis to the Opinion of June 8, 2006 (App-1). Any side-by-side reading of those documents will prove that unfortunate fact. The Bar's brief document is taken from the Oregon State Bar's Trial Memorandum (App-28) which *speculated* for the Trial Panel on what the Bar *thought* the evidence (more particularly the testimony) *would be*. There was no testimony because the Trial Panel chose to take the case under advisement based on the written submissions and the evidence. This was consented to by both parties, partly because there had been extensive discovery and the case could easily be made out on those depositions. The Oregon Supreme Court Opinion *could not* have been written by anyone who had reviewed that evidence as is documented

in Paulson's Petition for Reconsideration which the Oregon Supreme Court denied without comment.

If the Constitutional amendments are there to safeguard the individual against the awesome power of the government, then this case is fertile ground to examine whether due process is due Paulson. The property taken away from Paulson is the liberty interest of earning a living and the loss of income. Of much greater proportions is, however, the loss of reputation which in this circumstance has taken a pummeling. Paulson practices in his home town and this suspension was front-page news in the local newspaper. Paulson's twenty-year law practice in his home town is truncated due to the adverse publicity in this case. With what is at risk, Paulson is entitled to a settled course of judicial proceedings which are supposed to protect him through rules which govern all. De novo review is statutorily required here. ORS 9.536(3). Due process is denied if not followed. Paulson has a right to know if the rule of de novo review was followed. Oregon Supreme Court rules allow a Petition for Reconsideration which Paulson filed (App-84), and which pointed out the patent errors in the Oregon Supreme Court Opinion of June 8, 2006. Paulson then asked that a certified copy of the record be made to facilitate this appeal and to provide to the Ninth Circuit in the Companion Case. First, the Supreme Court Trial Administrator said they would. Then they confirmed they would and specified the charges which Paulson confirmed he would pay. Paulson wrote back he agreed to front those charges. Then the Supreme Court of Oregon changed their mind and shipped the 'record' back to the Oregon State Bar ruining the chain of custody of the real 'record.' It also creates the question of whether the

Oregon Supreme Court even had the complete record in the first place for their review anew.

The State's obligations under the Fourteenth Amendment are not general. The State owes to each individual that process which, in light of the values of a free society, can be characterized as due. *Boddie v. Connecticut,* 401 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1971). Can it be doubted that citizens of the State of Oregon would expect their Supreme Court, as required by the law, to read the record before them before dispatching one to the unemployment line or before soiling that citizen's reputation. Moreover, isn't it fair? The guaranty of due process reflects traditional notions of fair play and substantial justice according the famous case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945). For a court to refuse to read the record on de novo review is enough to " . . . shock the sense of fair play" which is required by *International Shoe.*

What, after all is "fair play"? Fair to whom? Here, a public must be protected from unethical lawyers. Justice is the first virtue of social institutions. A lawyer who is without power must be protected from a governmental regulatory body that has overreached. The judiciary, in theory, is here to protect all parties against the wrongs of the one, or stated another way, do justice between competing interests. But how can this whole be analyzed to determine if there has been a failure? In examining Plato's position on the subject, noted historian, philosopher and author Will Durant posited that there are only three things worthwhile in this world – justice, beauty and truth. Will Durant, *The Story of Philosophy,* 39, Simon and Schuster (1926). Plato ventured a definition. "Justice," he says in *The Republic* at 433, is the having and doing what

is one's own. He explains that each man (sic) shall receive the equivalent of what he produces, and shall perform the function for what he is best fit. A just man is a man in just the right place, doing his best, and giving the full equivalent of what he receives. A society of just men then would be an efficient group. But the important point is that there would be a harmonious interaction of the whole with each doing his or her just part. Every element would be in its place fulfilling its appropriate function. Where each does not perform their part, where men are out of their natural places, where the business man subordinates the statesman, or the soldier usurps the position of the king – there the coordination of the parts is destroyed, the joints decay, the society disintegrates and dissolves. Justice requires the effective coordination of the whole. Current Oregon Supreme Court Chief Justice Paul J. De Muniz appears to intellectually agree with this proposition for he states in the Oregon Bar Bulletin article for his new regime:

> "The judiciary solves problems and upholds the rule of law, while the public respects the judiciary's authority and enables judges to do their jobs. *A failure anywhere in the system threatens the entire arrangement.*" (Emphasis supplied). Vol. 66, *Oregon State Bar Bulletin* (Page 10, July, 2006).

And in the individual too, justice is effective coordination with each one contributing to the behavior of the whole. So, if the ethical prosecutor here does his/her part, unethical lawyers are, after a fair and appropriate investigation, brought before the mast. The Trial Panel then commences the vital role on the front lines of sifting through the evidence, hearing testimony, analyzing the law and making a just and fair ruling. If these parts

interact harmoniously, then the individual survives and succeeds; if any individual loses their proper place and function, then chaos reigns and the harmony ceases. In the spirit of examining the whole, it should be noted here that the Oregon Supreme Court nowhere mentions the Trial Panel's evidentiary rulings. Paulson proffered a Motion to Dismiss in the disciplinary case with substantial evidence on the issue of prosecutorial misconduct and the ex parte contact. Due process requires that a party sought to be affected by a proceeding *shall have* the right to raise such issues or set up any defense which he may have in the cause. The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. *Holt v. Virginia*, 381 U.S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965). A proceeding which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law.

Plato cautions that justice is not mere strength, but harmonious strength. The path to justice is intelligence and organization. Justice is not the right of the stronger, but the effective harmony of the whole. Rules become part of the path of intelligence and organization. But everyone must know the rules. Here, the Oregon Supreme Court, when asked whether any specific justice read the entire record, replied through their Appellate Legal Counsel that " . . . the court considers the case consistent with its review authority." (App-131). There is no further information whether that means yes or no to the question asked. Are there some rules known only to the Oregon Supreme Court? *But* they have no written internal rules. What rules guide their "review authority"? Perhaps that answer by the Oregon Supreme Court's counsel is intended to refer to the requirement of de novo review as discussed

below. How can there be a complete review of the record when volume three (3) of the trial court file is missing? (A certified copy of the entire trial court file was made a part of the record by the Bar in this disciplinary case). The harmonious interaction of the whole is required before there can be a fair result and it is just to require to know whether any member of the Oregon Supreme Court reviewed this record.

The Record – Paulson caused to be examined the Trial Court record in the Nutt/Gensman matter following Judge Beckman's ruling on July 1, 1999, along with the Nutts' Motion for a New Trial. Paulson had his staff examine the trial court file and the affidavit of that staff member, part of the record in this case, demonstrates that of the six volumes of the Trial Court file, two were from another pending case in Multnomah County regarding asbestos. The third file was and is still missing. This was confirmed in the deposition of the local Trial Court Administrator, Douglas Bray, and later reconfirmed in Judge Beckman's deposition and never denied by anyone. (Trial Judge Douglas Beckman also affirmed in his deposition that out of six volumes, the only thing he read prior to dismissing the Nutts' case was the complaint!) There, as here, judges do not readily reveal what they have read nor not read unless asked. Paulson complained of all this formally to the local Multnomah County Bench-Bar committee and the Oregon Judicial Fitness Committee. The result – the Trial Court Administrator, Mr. Bray, reshuffled the record to correct the misfiling **and concomitantly and unilaterally destroyed the trial court record for the Nutts' appeal that followed.** The harmonious coordination of the whole?

History Repeats Itself – Now, *after* Paulson requested a certified copy of the record in this disciplinary case, the Oregon Supreme Court has shipped the entire record back to the Oregon State Bar *without* making a certified copy of the extant record on appeal. The chain of custody is lost on appeal. The harmonious coordination of the whole is lost on appeal.

It is true that those who get out of the place to which nature and talent adapt that individual, may, for a time, seize some profit and advantage; but an inescapable Nemesis pursues – as Anaxagoras spoke of the Furies pursuing any entity that should wander out of orbit. Truth changes her garments frequently, but under her habit she remains always the same because truth is the first virtue of thought. Justice, when it works in harmony with the whole, can truly be beautiful. An ugly picture emerges here for any neutral observer to see. How is the public to know when judges don't read stuff? What can the public do if judges do not?

De Novo Review – In order for the requirements of due process to be met, the trial must be had in accordance with the settled course of judicial proceedings. Even though the concept of due process of law is not final and fixed, its limits are derived from considerations that are fused in the very nature of the judicial process. *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952). While there is no law granting the Oregon Supreme Court the right to rule de novo *without* examining the entire record, there is *substantial* law requiring that the entire record be examined by the Oregon Supreme Court in de novo cases.

The Trial Panel decision of April 8, 2005 (suspending Paulson for only 45 days) is required to be reviewed de novo. ORS 9.536(3); BR 10.6. In the United States, trial de novo on appeal is the historical outgrowth of a legal system which is, in large part, a descendant of the English system. 27 Am. Jur. 2d 518, Equity §3.

> "'Appeal,' as it was taken from the civil law and applied in the English courts of equity, amounted to a transfer of the proceedings as such from the court below and a trial de novo, on the laws and facts, in the superior court." *State v. Hard,* 339 Mo. 897, 98 S.W. 2d 593 (1936).

The requirement on de novo review on the law *and* the facts anew is mandatory in Oregon. *In Re Estate of Cruson*, 189 Or. 537, 221 P. 892, 20 A.L.R. 2d 219 (1950). The cause must be tried anew upon the record in the fullest sense. *Hannan v. Good Samaritan Hospital*, 4 Or. App. 178, 471 P.2d 831, 835 (1970). On disputed facts it is the rule of the Oregon Supreme Court to give great weight to the findings of the trial panel and not lightly to set them aside. Where the evidence is conflicting, the Oregon Supreme Court has a **duty to examine the record with care for the purpose of determining the truth.** *In Claude v. Claude*, 180 Or. 62, 79, 174 P. 179, 186 (1946). The duty extends to examine the record independently which *is required. Liggett v. Lester*, 237 Or. 52, 57, 390 P.2d 351, 354 (1964).

> "We have a responsibility in every case such as this to make our own independent study of the record and arrive at our own conclusions respecting it."
>
> *Roberts v. Mariner*, 195 Or. 311, 348, 245 P.2d 927, 943 (1952).

In setting aside the Trial Panel's decision, the Oregon Supreme Court does not discuss this standard on review in its Opinion of June 8, 2006 (App-1).

To judge in a contested proceeding implies the hearing of evidence from both sides, a comparison of the merits of the evidence, a conclusion from the evidence of where the truth lies, the application of the appropriate laws to the facts found, and the rendition of judgment accordingly. 16A Am. Jur. 2d 1058, Constitutional Law §847. For example, Paulson wanted various depositions to be made part of the record, but the Trial Panel excluded Wayne Appleman's along with several other depositions. Appleman, a former federal contract lawyer, had never tried a case in his life. Yet Sapiro hired him to investigate Paulson in the Nutt/Gensman case which was litigated for two years with multiple Trial Court rulings (five on the summary judgment proceedings alone). His investigation took eight months and delved into extraneous matters of Paulson's life way beyond this case. Paulson wanted that deposition in. The Trial Panel, after private conferences, excluded it. Suppression of evidence exculpatory to the accused is a violation of due process. It is unknown if the Oregon Supreme Court reviewed the ruling of the Trial Panel on this exculpatory evidence or was even aware of the evidentiary issue as it is not discussed in the Opinion at all. The right under the due process clause to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence and have judicial findings based upon it. *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1936). This would require the Oregon Supreme Court to at least discuss evidence submitted by Paulson. There is no mention of any evidence submitted by Paulson. It is

established that there is no hearing in the constitutional sense where the party does not know what evidence is considered by the court and is not given an opportunity to test, explain or refute that evidence. *Interstate Commerce Com. v. Louisville & N.R.A. Co.*, 227 U.S. 88, 57 L. Ed. 431, 33 S. Ct. 185 (1913). For example, as explained in detail in the Petition for Reconsideration, the Bar alleges that Paulson "pressured" the Nutts to appeal. On the contrary, a noted Oregon appellate lawyer met with the Nutts regarding their appeal and sent them a five-page letter on their appeal prospects after meeting with the Nutts and reviewing their case. This five-page letter is in evidence but not discussed in the Opinion.

The duty of the Oregon Supreme Court Justices to make their own independent study of the record is a nondelegable duty. "It has often been held that a judge may not delegate his (sic) judicial authority or the performance of judicial acts." 46 Am. Jur. 2d 110, Judges §23. The Justices of the Oregon Supreme Court may not delegate the absolute duty to independently review the record in this case to unknown judicial clerks or perceived staff experts who are not accountable to anyone.

B. How the Oregon Supreme Court Failed Here: There are no written rules on what the Oregon Supreme Court must do here except the Oregon statutory requirement of de novo review. In Oregon, this means that there must be a trial anew on the extant record, including prior evidentiary rulings " . . . in the fullest sense." No Oregon Supreme Court justice will simply affirm that they have done that which means they have not. The trial court record has been altered since July 1, 1999. Volume 3 of that record is still missing so no one could have examined the entire record in this case, but that omission was not

mentioned by the Oregon Supreme Court. Now the disciplinary appellate record has been reshuffled and denied to Paulson. Why? Would the examination of that record reveal the same disaster of the record in the Nutt/Gensman matter? Did the Oregon Supreme Court even have the entire disciplinary record? Not one evidentiary part of the record, nor any of the hundreds of exhibits, is mentioned in the Oregon Supreme Court Opinion. The whole is left out for the sake of expediency for the few.

C. Why the United States Supreme Court should accept this case: The supreme irony of this case is that Paulson broke not one rule; not a procedural rule, not a statutory rule, not an ethical rule, not one rule. The Oregon Supreme Court points to none. While the Opinion accuses Paulson of ignoring and violating procedural rules, no specifics are discussed (App-22).

An articulated standard of proof, as required by the due process clause of the Fourteenth Amendment, and the needs for fact finding, instructs the fact finder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. A standard of proof allocates the risk of error between the litigants and indicates the relative importance attached to the ultimate decision. Here the standard is clear and convincing evidence. The Oregon Supreme Court states they " . . . conclude that the Bar has proved by clear and convincing evidence that the accused's conduct during the course of the state court proceeding violated DR 1-102(A)(4)." (App-22). But what evidence? There were hundreds of exhibits and thousands of pages of the record. The Oregon Supreme Court refers to not one page of the record nor a single exhibit. Of what use does a party gather evidence for trial or articulate erudite

citations of law to the facts and the law if it is not used by the judging tribunal?

The evidence here is that Oregon Supreme Court only read one document, the Oregon State Bar's brief, faulty in its entirety, because the Opinion paraphrases the Bar's brief. Cases proceed upon the theory that a court acts not arbitrarily but in conformity with the general law, *upon evidence*, and after inquiry made with notice to the parties affected and an opportunity to be heard. *Jordan v. Massachusetts*, 225 U.S. 167, 56 L. Ed. 1038, 32 S. Ct. 651 (1912). Indeed, under substantive due process it is said that protection from arbitrary action is the essence of the safeguard when life, liberty and property is at stake. There is significant evidence that the Oregon Supreme Court does act arbitrarily (e.g., deciding the Nutts' mandamus petition of over 300 pages which was filed in 2000 in one day) and did act arbitrarily here. It cannot be doubted that it is tedious to page through a long and historical record, but justice must be done. Even though bar proceedings are *sue generis*, there is a penal element here that raises the standard of inquiry into what the Oregon Supreme Court has wrought.

The United States Supreme Court should accept this case because the Oregon Supreme Court has denied Paulson due process by not reading the record, by not reviewing the Trial Panel's rulings, by not reviewing the evidence, by not considering Paulson's arguments. Compounding this failure is the punitive nature of the Opinion by Oregon Supreme Court dated June 8, 2006. The Trial Panel did not find Paulson in violation of Oregon's Code of Professional Responsibility except regarding a very narrow portion of Paulson's involvement in the bankruptcy proceeding. The Trial Panel voted to suspend Paulson from

the practice of law for **45 days**. Paulson appealed. The Oregon Supreme Court decision suspended Paulson for **six months**, essentially ending his twenty-year solo practice of law in his home town of Aloha, Oregon. What judicial proceeding allows the sanction to be worse to the appealing party if he appeals and loses? That is what occurred here. The significance of the increased sanction from 45 days to six months is more than apparent on its face. When one is suspended for six months, the attorney must reapply for reinstatement to practice law, where one does not have to so apply when the suspension is less than six months.

So, there is much more at stake than a usual attorney disciplinary matter, strident as it appears. Those in power seek to diminish and suppress the lonely voice of dissent. So far they have been extraordinarily successful.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Oregon Supreme Court dated June 8, 2006. **In addition, the Petitioner respectfully requests that the Court issue an emergency stay of that decision vis-a-vis the suspension immediately upon receipt of this petition so Paulson may practice law for the nonce.**

Respectfully submitted,

LAUREN PAULSON, OSB #73232

341 Or. 13

Filed: June 8, 2006

IN THE SUPREME COURT OF
THE STATE OF OREGON

In re:

Complaint as to the Conduct of

LAUREN J. PAULSON,

Accused.

(OSB No. 01-100; SC S52465)

On review of the decision of a trial panel of the Disciplinary Board.

Argued and submitted January 4, 2006.

Lauren J. Paulson, Aloha, argued the cause and filed the briefs on his own behalf.

Mary Anne Cooper, Assistant Disciplinary Counsel, Lake Oswego, argued the cause and filed the brief for the Oregon State Bar.

Before De Munix, Chief Justice, and Gillette, Durham, Rigs, Balmer, and Kistler, Justices.*

PER CURIAM

The accused is suspended from the practice of law for six months, commencing 60 days from the effective date of this decision.

*Carson, J., did not participate in the consideration or decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Oregon State Bar

[ ] No costs allowed.

[X] Costs allowed, payable by: Accused

[ ] Costs allowed, to abide the outcome on remand, payable by:

PER CURIAM

In this lawyer disciplinary proceeding, the Oregon State Bar (Bar) charged the accused with violating Code of Professional Responsibility Disciplinary Rule (DR) 1-102(A)(4), a rule prohibiting conduct that is prejudicial to the administration of justice.[1] A trial panel of the Disciplinary Board concluded that the accused's conduct had violated DR 1-102(A)(4) during a bankruptcy proceeding, but that his conduct during a state court proceeding in which he had represented the same clients had not. The trial panel suspended the accused from the practice of law for 45 days. The accused now seeks review of that decision pursuant to BR 10.1 and ORS 9.536(1). On review, the Bar argues that the trial panel erred in concluding that the accused's conduct in the state court proceeding did not violate DR 1-102(A)(4) and that the trial panel should have imposed a longer period of suspension.

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[1] The Oregon Rules of Professional Conduct became effective January 1, 2005. The conduct at issue in this proceeding occurred before that date, and we therefore apply the Oregon Code of Professional Responsibility.

We review the trial panel's decision *de novo.* ORS 9.536(3); BR 10.6. The Bar must establish the alleged misconduct by clear and convincing evidence. BR 5.2. "Clear and convincing evidence" means evidence establishing that the truth of the facts asserted is highly probable. *In re Johnson,* 300 Or 52, 55, 707 P2d 573 (1985). For the reasons that follow, we agree with the trial panel's conclusion that the accused's actions during his client's bankruptcy proceeding violated DR 1-102(A)(4). However, we disagree with the trial panel's conclusion regarding the accused's conduct during the state court proceeding. Instead, we conclude that the accused's conduct during the course of that proceeding also violated DR 1-102(A)(4). We further conclude that the appropriate sanction is a six-month suspension from the practice of law.

I. FACTS AND PROCEDURAL BACKGROUND

The relevant facts are, for the most part, undisputed. In 1997, Jerry and Phyllis Nutt, a retired couple, purchased a modular home for installation in Hebo, Oregon. The Nutts contacted Mark Gensman, a mortgage broker with Business Resource Group (BRG), for construction financing. Gensman met with the Nutts and arranged for a construction loan to purchase and install the modular home. The terms of the loan required payment within four months, at which point the Nutts were to obtain permanent financing on their home. The Nutts encountered problems with delays and defects in the installation of their modular home, however, and the construction loan deadline expired.

On October 20, 1997, the Nutts sought legal advice from the accused regarding the acquisition of permanent

financing. The accused reviewed the Nutts' loan documents and advised them to pursue a claim against Gensman and their construction lender. The Nutts expressed a desire simply to finish their home and indicated their reluctance to get involved in extensive litigation. Nevertheless, as difficulties with the installation of the home continued, the Nutts and the accused agreed to take legal action against the parties involved in financing and constructing the home. Specifically, the complaint alleged that Gensman, BRG, and the other parties involved had failed to make various disclosures relating to the terms of the loan pursuant to the Truth in Lending Act (TILA), the Oregon Lender Law (OLL), and the Oregon Unfair Trade Practices Act (UTPA), and that those nondisclosures also constituted fraud.[2] The resulting complaint alleged seven different claims and damages totaling $500,000. The complaint also sought an unspecified amount in punitive damages.

Steven Berman and John Dunbar, the lawyers representing Gensman and BRG, evaluated the Nutts' complaint and concluded that, at most, the Nutts might be entitled to recover a portion of their loan fees. Furthermore, Berman and Dunbar concluded that the complaint was vulnerable to attack on several grounds. On June 3, 1998, Berman wrote to the accused, requesting a meeting to discuss the issues in the case. The accused failed to respond. Two weeks later, Berman again wrote to the accused, addressing the complaint's perceived deficiencies. Several days later, the accused responded by letter, stating that he was "feeling real pouty" and that he was "sending

[2] The complaint failed, however, to state the manner in which those nondisclosures had harmed the Nutts.

a copy of this letter to my clients so they know I am on the ball and you're not." Upon receiving the letter, Berman attempted to contact the accused by telephone, but the accused did not return the call. Berman then advised the accused that he would move to correct what he perceived to be the complaint's deficiencies.

On August 11, 1998, Berman spoke with the accused and requested a damages estimate. Although the accused assured Berman that he would provide an estimate within one week, he failed to do so. Instead, the accused notified Berman that he intended to apply for an order of default against Berman's and Dunbar's clients.

On September 4, 1998, Berman served a request for admissions and a request for production of documents. In addition, Berman again asked that the accused provide an estimate of damages, as well as a settlement proposal. The following day, the Nutts sent the accused a letter that estimated their damages. The Nutts identified approximately (1) $5,000 in construction-related damages; (2) $6,000 in damages that they felt had been caused by Gensman; (3) $25,000 in "consequential damages" due to the delay in construction; and (4) $65,000 in "consequential damages" from Gensman and BRG for "undue stress, frustration, and possible loss of health."

The accused did not respond to Berman's settlement suggestion until October 16, 1998, when he wrote a letter demanding approximately $15,000 in "actual damages" and $20,000 in "general damages." In that letter, the accused indicated that, if the Nutts' "demand for settlement is not agreed to within 20 days[,] * * * then there will be no further negotiations" and that a "counter-offer will immediately terminate negotiations."

Meanwhile, the accused had failed to respond to Berman's September 4, 1998, request for production, had failed to request an extension to respond, and had failed to respond to Berman's letters attempting to confer with him. Finally, on October 15, 1998, Berman moved for attorney fees, to compel production of documents, and, pursuant to ORCP 21 (hereinafter, "Rule 21"), moved to correct the deficiencies in the complaint. A hearing on those motions was scheduled for November 12, 1998.

On November 3, 1998, Berman served a second request for production of documents. The accused failed to respond to that request. He also failed to inform the Nutts that the request had been made or to ask them to provide the requested documents.

Several days later, the accused received a letter from Berman indicating that the Nutts would be liable for attorney fees should Berman prevail on the merits of the litigation.

On November 10, 1998, the accused responded to Berman's Rule 21 motion and his motion to compel. In the response to the motion to compel, the accused offered the Nutts' poor health as justification for the failure to produce the requested documents. The accused included an affidavit, which represented that Phyllis Nutt recently had undergone complex surgery and that Jerry Nutt was suffering from a chronic "health situation." The accused, however, had not asked the Nutts to compile any documents until after Berman had moved to compel.

On November 12, 1998, the trial court granted Berman's motion to compel and struck the complaint's damage allegations under the TILA and the OLL. The court ordered the accused to make a "more definite and certain

* * * factual statement as to how plaintiff was injured" by the alleged violations. The court also struck the claim for punitive damages, because the accused had failed to follow the procedures required for seeking punitive damages.

On November 17, 1998, Berman made yet another settlement overture, again reminding the accused of the Nutts' possible liability for attorney fees. Berman offered to settle the case for $2,000 and to waive Gensman's right to demand attorney fees. The accused rejected Berman's offer, stating that the Nutts had authorized him to reject "this nuisance offer." The accused stated that there would be "no counter-offer" and that he would "not engage in any further negotiations."

On November 19, 1998, Berman deposed the Nutts. Prior to the deposition, the accused had informed Berman that Gensman's conduct had exacerbated the Nutts' health issues. Berman inquired about those health issues during the deposition. The accused, however, refused to allow either of the Nutts to answer any health-related questions. Following the deposition, the Nutts were upset by what they perceived as the accused's confrontational style and by his refusal to allow them to answer questions about their medical conditions.

On December 7, 1998, Berman proposed that the parties participate in a pretrial settlement conference. Although the Nutts appeared eager to resolve their legal situation, the accused ignored Berman's proposal.

On December 10, 1998, the accused filed an amended complaint. On December 16, 1998, Berman wrote to the accused and expressed his concerns that the amended complaint had not alleged any factual basis for the damages claimed under the TILA and the UTPA. Berman also

pointed out that the accused had not repleaded the fraud claims, as the trial court had ordered.

On December 31, 1998, Berman again wrote to the accused. The accused had not responded to the second request for production of documents or to Berman's December 16, 1998, letter. Berman asked for the requested documents and for an indication as to whether the accused intended to remedy the deficiencies in the amended complaint. The accused did not respond.

On January 20, 1999, Berman filed a Rule 21 motion attacking the amended complaint. Berman also moved for partial summary judgment and for attorney fees. The summary judgment motion contested the Nutts' right to damages in three of the four claims for relief alleged against Gensman in the amended complaint.

The accused opposed those motions by filing an affidavit from the Nutts, which claimed that the Nutts had been "harmed a lot financially" and that Gensman's conduct had caused them to suffer "emotional and physical stress that ultimately caused physical ramifications."

On March 15, 1999, 11 months after filing the action, the accused served plaintiffs' first request for production of documents. The accused previously had served no other discovery requests. Trial was set for July 1, 1999.

On April 14, 1999, the accused wrote to Berman and informed him that, on April 15, 1999, he intended to appear *ex parte* in an attempt to reinstate the Nutts' claims against another party, who had been dismissed for lack of service. To avoid any delay of the trial, Berman appeared to oppose the motion. Ultimately, the accused did not offer his motion.

On April 15, 1999, Berman responded to the accused's request for production of documents. Berman objected to most of the requests as overbroad and unduly burdensome. Berman did offer to produce documents relating to the Nutt transaction subject to a protective order, after the trial court ruled on the pending motions. The accused did not attempt to confer with Berman regarding that response.

Berman's motion for partial summary judgment was argued in five separate hearings. On March 19, 1999, the first of those hearings, the trial court granted Berman's motion on the Nutts' TILA claim, ruling that TILA did not apply to Gensman and BRG. At the second hearing, the court granted, for the most part, Berman's motion on the Nutts' OLL claim, ruling that Gensman had made the proper disclosures, but left open whether Gensman's disclosures concerning the Nutts' ability to rescind the transaction had satisfied the OLL. The court also noted that the accused had failed to plead any damages under the Nutts' UTPA and again had failed to follow the proper procedures to seek punitive damages. The accused agreed with the court that he needed to "rush off and amend [his] pleadings." However, the accused did not attempt to amend the complaint again until almost five months later.

On April 20, 1999, the accused brought the Nutts to the courthouse. The accused hoped to obtain a default judgment against American Modular Homes, who had not appeared as a party in the litigation. The accused had failed, however, to obtain a default order from the presiding judge, as required by trial court rule. Nevertheless, the accused asked the assigned judge to sign the order of default. The judge signed the order, after informing the accused of the procedural defect and stating that the order

may not be valid. The judge then invited the accused to present a *prima facie* case on the issue of damages. In response, the accused told the judge that the Nutts could "articulate [that issue] a lot better than [he could]." Under oath, Jerry Nutt testified that he had spent $6,000 on repairs and thought that he may have incurred additional expenses for plumbing and cabinetry ranging between $5,000 and $10,000.

Based on that information, the judge offered to sign a judgment against American Modular Homes for $20,000. The judge also allowed the Nutts to submit additional evidence of damages. As a result, the accused had Jerry Nutt sign an affidavit concerning damages and submitted that affidavit to the trial court with a proposed form of judgment for $700,000 in economic damages, plus $14,655 in attorney fees. Upon receiving that affidavit, the judge informed the accused that the affidavit "stated only conclusions and [would] not be relied upon" to determine damages.

Meanwhile, at the third summary judgment hearing on Berman's motion, the trial court ruled that the accused had not offered sufficient evidence of fraud and granted summary judgment to Gensman on that claim. At that time, Dunbar made another settlement overture to the accused, stating that the Nutts' "remaining claims are not strong ones, and the most you can hope to achieve * * * is a few hundred dollars[.] * * * [The Nutts] are at enormous risk for a sizable fee award." The settlement offer included payment of $2,500 and a waiver of Gensman's right to collect attorney fees.[3]

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[3] As of that date, Gensman's attorneys fees totaled almost $23,000.

On June 9, 1999, at the fourth summary judgment hearing on Berman's motion, the trial court dismissed most of the Nutts' UTPA claim and all the fraud claims. After that hearing, Berman and Dunbar made another settlement offer. They noted that the Nutts' case against Gensman had diminished to a $200 UTPA claim and that the Nutts were at risk for a sizable attorney fee award, and they offered to settle for $1,000 and to waive Gensman's right to collect attorney fees. The accused did not inform the Nutts of that settlement offer. Neither did the accused inform the Nutts that they could be held liable for attorney fees.

On July 1, 1999, the Nutts appeared in court believing that they were going to try their case to a jury. The accused had not informed them that only the $200 UTPA claim against Gensman had survived summary judgment and that the scheduled proceeding was a hearing, not a trial on the merits of their claims. The accused assured the Nutts that they would win easily and that they need not worry about attorney fees. Because the accused had failed to remedy the deficiencies in the complaint and could not articulate a theory of damages, the trial court dismissed the Nutts' remaining claims.

A hearing for entry of a final judgment in favor of Gensman occurred on August 23, 1999. At that hearing, the accused argued that the Nutts had been treated unfairly and accused two judges of denying the Nutts a full and fair hearing. After that hearing, the trial court entered a judgment against the Nutts that awarded Gensman and BRG attorney fees and costs, in an amount to be determined at a later date.

On September 2, 1999, the accused moved for a new trial. In that motion, the accused claimed that two of the judges had abused their discretion by denying his prior motions and that Gensman's lawyers had engaged in "judge shopping" and had made misrepresentations to the court. On September 20, 1999, the trial court denied the accused's motion and scheduled the attorney fees hearing for October 13, 1999.

Prior to the October hearing, the accused took no steps to reduce the Nutts' liability for attorney fees, and did not inform the Nutts when the attorney fees petitions would be heard or that they could attempt to limit the fees awarded. Additionally, although the trial court had changed the date of the attorney fee hearing to accommodate the accused, the accused failed to appear at the hearing. On November 4, 1999, the court awarded the full requested amount of attorney fees and an additional $10,000 as enhanced prevailing party fees, for a total judgment against the Nutts of $61,561.63.

On December 3, 1999, the trial court entered the final judgment awarding attorney fees. On December 7, 1999, the accused moved to disqualify the judge who had entered the December 3 order and to stay enforcement of the judgment.

On December 28, 1999, having persuaded the Nutts to proceed with an appeal, the accused filed a cost bond on appeal and an undertaking signed by the Nutts, stating that they would pay the judgments against them if they did not prevail on appeal. The respondents on appeal objected to those documents as insufficient. On January 25, 2000, the trial court held that the accused's submissions were insufficient to prevent the defendants' lawyers

from executing on their clients' judgments. During that hearing, the accused refused to stand when addressing the judge and acted in a manner that the judge described as "extremely bizarre * * * [and] threatening."

The Nutts' bank accounts were thereafter garnished, and, ultimately, they decided to file bankruptcy. The Nutts retained a different attorney, Cary Gluesenkamp, to represent them in their bankruptcy proceeding. Gluesenkamp filed the Nutts' bankruptcy petition on February 25, 2000. The pending appeal of the Nutts' original case was an asset of the bankruptcy estate. In April 2000, the Nutts' bankruptcy trustee asked Berman if he would be interested in settling the appeal. Because the accused was the attorney of record for the appeal, the bankruptcy trustee advised the accused of a possible settlement and explained that the bankruptcy estate did not have the necessary funds to pursue the appeal.

The Nutts told the bankruptcy trustee that they did not wish to pursue the appeal. Accordingly, the trustee accepted Berman's offer of $2,000 to settle the appeal and informed the accused. Without contacting the Nutts or Gluesenkamp, the accused filed an objection to the settlement proposed in the bankruptcy proceeding. In that objection, the accused identified himself as the attorney for the debtors, although he was not representing the Nutts in the bankruptcy proceeding.

After learning of the accused's objection, Gluesenkamp telephoned the accused, but the accused did not return his calls. On July 20, 2000, Gluesenkamp wrote to the accused, stating that the Nutts were "very adamant" that they did not want to object to the proposed settlement and

did not consent to the accused's objection. Gluesenkamp instructed the accused promptly to withdraw his objection.

The accused did not immediately withdraw his objection. Rather, the accused filed a "memorandum" with the bankruptcy court, asking that court to revisit the state court judgments against the Nutts due to "irregularities." The accused also wrote to Gluesenkamp and requested a conference call with him and the Nutts. During that conference call, the Nutts informed the accused that they did not want him to proceed further. The Nutts reiterated that statement in a letter to the accused: "We do not wish to continue any objection to the discharge of our bankruptcy. We request [that] you * * * take the steps required to close out and remove us from any further involvement related to this case." The accused did not respond to the Nutts' letter. Two weeks later, Gluesenkamp again wrote the accused, stating that the Nutts were still "anxiously awaiting" withdrawal of his objection to the proposed settlement.

The accused did not withdraw his objection in the bankruptcy proceeding until August 29, 2000. As to the original state proceeding, the accused informed Gluesenkamp that he would withdraw "at the appropriate point." Months later, however, the accused still had failed to comply with the Nutts' request that he immediately cease activity in the state proceeding. On December 21, 2000, he wrote the Nutts a letter purporting to explain the ongoing status of the case. Finally, on June 11, 2001, the Nutts wrote to the court, stating:

> "We do not understand what [the accused] is doing in that [the state proceeding] was dismissed, a bankruptcy that we filed as a result of the decision on that case has been discharged, and an

> appeal request that [the accused] made was dismissed. We have been asking if all of this action had been completed and we can finally put it all behind us. Now we have received a copy of correspondence from you to [the accused] and his correspondence to us saying that this fiasco is still not closed * * * . [We] sincerely want to move on and put all of this behind us."

In January 2003, the Bar charged the accused with violating DR 1-102(A)(4) based on the accused's actions in both the Nutts' state court proceeding and the bankruptcy proceeding. Following a hearing in September 2004, a trial panel found that the accused's "improper actions in the bankruptcy proceeding violated DR 1-102(A)(4)." However, the trial panel concluded that the accused's conduct during the Nutts' state court proceeding did not violate DR 1-102(A)(4). The accused petitioned this court for review. The Bar, in its response, also challenged certain aspects of the trial panel decision.

II. ACCUSED'S PRELIMINARY ARGUMENTS

As an initial matter, the accused challenges a number of the Bar's factual assertions or otherwise responds to those assertions. We have reviewed all the accused's specific arguments in that regard and conclude that we need not address those arguments because their resolution in the accused's favor would not affect our decision.

III. DR 1-102(A)(4) ANALYSIS

We turn to the Bar's allegation that, in both the state court proceeding and the bankruptcy proceeding, the accused's conduct violated DR 1-102(a)(4), which provides:

> "It is professional misconduct for a lawyer to * * * [e]ngage in conduct that is prejudicial to the administration of justice[.]"

The accused challenges the trial panel's conclusion that his actions in the Nutts' bankruptcy proceeding constituted "conduct that is prejudicial to the administration of justice."[4]

Regarding the bankruptcy proceeding, the accused contends that (1) he violated no ethical rule by filing an objection to the settlement; (2) he was acting as the attorney of record in the state court proceeding but did not represent himself to be the attorney of record in the bankruptcy proceeding; (3) he filed his objection to the settlement only to protect the record, in the event that the Nutts decided to pursue an appeal; and (4) the trial panel was required to find that he lied in his December 21, 2000, letter to the Nutts to conclude that he had committed an ethical violation. The accused further argues that the trial panel failed to identify the "law, statute, rule, [or] protocol" that the accused violated by filing the June 26, 2000, objection in the Nutts' bankruptcy proceeding.

In reviewing a purported violation of DR 1-102(A)(4), this court first must determine "whether [the] accused lawyer engaged in 'conduct,' by doing something that the lawyer should not have done or by failing to do something that the lawyer was supposed to do." *In re Gustafson,* 327

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[4] The accused also argues that "this matter must be dismissed" because of prosecutorial misconduct and prejudicial delay. The Bar admits to a delay in pursuing this matter, but contends that delay is not a reason to dismiss. Rather, the Bar argues the delay should be considered as a mitigating factor in determining the appropriate sanction. As discussed later in the opinion, we agree with the Bar.

Or 636, 643, 968 P2d 367 (1998). Next, we determine "whether that conduct occurred during the 'administration of justice.'" *Id.* Finally, we must consider the extent of "the 'prejudice' arising from the lawyer's conduct." *Id.* Prejudice can result from several minor acts or from one serious act. *In re Kluge,* 335 Or 326, 345, 66 P3d 492 (2003).

It is improper for a lawyer to file court documents knowing or having reason to know that the lawyer is not counsel of record for the client on whose behalf the lawyer purports to act. The accused violated that basic tenet by filing an objection in the bankruptcy proceeding – an objection that could have been understood only as having been filed on the Nutts' behalf. The accused was not Nutts' counsel in the bankruptcy proceeding. And, even if the accused did have some authority to file the particular objection that he filed, the Nutts had informed him that the objection was contrary to their wishes. Nevertheless, the accused submitted a *second* filing in support of the first filing, despite knowing that the Nutts had not consented to the objection set out in the first filing. Moreover, the accused waited more than a month to withdraw his objection after receiving Gluesenkamp's second letter requesting that he do so. Because the accused's filings impeded the orderly operation of the courts and imposed an undue burden on the judicial system, the accused's actions with respect to the bankruptcy proceeding violated DR 1-102(A)(4).

Turning to the state court proceeding, the Bar contends that the trial panel erred by concluding that the accused's actions in the Nutts' state court proceeding did not violate DR 1-102(A)(4). Specifically, the Bar points to the following actions: (1) signing the complaint and amended complaint in the Nutts' state court action without

evidence to support the damages claim (violation of ORCP 17 C(4)); (2) filing a complaint that included false and frivolous claims for damages (violation of ORCP 21 E); (3) including a claim for punitive damages in the original pleading (violation of *former* ORS 18.535(1) (2001), *renumbered as* ORS 31.725(1) (2003)); (4) failing to consider, to the Nutts' substantial detriment, defendants' offer to discuss a settlement (violation of Multnomah County Local Rule 6.012(1)); (5) failing to stand while addressing the court (violation of UTCR 3.050(1)); (6) instructing the Nutts not to answer questions about their medical condition at deposition when the complaint raised issues regarding their medical condition (violation of ORCP 39 D); and (7) failing to confer prior to moving to compel (violation of UTCR 5.010).

The trial panel concluded that those actions were unprofessional individually, but did not violate DR 1-102(A)(4). Specifically, the trial panel reasoned that the alleged statutory and procedural rule violations "leave much room for subjective interpretation" and that "[making those] subjective determinations * * * would effectively require [the trial panel] to review and comprehend the entire record in the underlying case." We disagree with the trial panel. It is true that not every negligent or unprofessional act, no matter how misguided, boorish, or rude, gives rise to an ethical violation. There are, however, circumstances in which a lawyer's cumulative actions are so egregious as to warrant sanction. For the reasons that follow, we conclude that the totality of the accused's conduct during the Nutts' state court litigation rose to that level.

As previously stated, to find a violation of DR 1-102(A)(4), this court first must determine that the accused

engaged in improper conduct, that the conduct occurred during the administration of justice, and that it resulted in prejudice. Here, the accused knew that the Nutts' concerns related to delays in the installation and the quality of the contractor's work. Despite that knowledge, he encouraged the Nutts to pursue recovery from their mortgage broker and lender for failing to disclose certain terms of credit for the Nutts' construction loan. Neither the mortgage broker nor the lender had caused the delays or faults in the installation. Moreover, it is unclear from the record how those defendants' alleged failures to make proper disclosures for the Nutts' short-term construction loan caused actual injury to the Nutts. Nevertheless, the accused filed a complaint that claimed, without explanation, that those defendants were liable to the Nutts for hundreds of thousands of dollars in damages.

Over the course of the state proceeding, opposing counsel made numerous attempts to have the accused explain and quantify the Nutts' damages and to consider settlement. However, the accused refused to comply with those requests, even when ultimately ordered to do so by the trial court. Given the apparent weakness of the case that the accused had filed and, particularly, the very limited damages that the Nutts could claim against the defendants, there was simply no justification for the accused's refusal to consider settlement seriously and to so advise the Nutts.

On July 1, 1999, the Nutts appeared before the trial court, unaware that their case had been decimated by a series of Rule 21 and summary judgment rulings. The accused had not informed the Nutts that they were at serious risk of having judgment imposed against them for statutory attorney fees. At that point, instead of

attempting to protect the Nutts from being held liable for attorney fees, the accused chose to focus his efforts on attacking the court for what were, in his opinion, unfavorable rulings. To make matters worse, the accused failed to appear at the attorney fee hearing, at which the court ordered the Nutts to pay more than $61,000. The attorney fee judgment, although entirely foreseeable to any attorney under the circumstances, was completely unexpected by the Nutts and literally forced them into bankruptcy.

At virtually every point in the litigation, the accused made a decision that placed the Nutts in an ever more vulnerable legal and financial position. Each time that the accused ignored or violated a procedural rule, the litigation became more complicated, protracted, and expensive, and ultimately served to prejudice the administration of justice. We conclude that the Bar has proved by clear and convincing evidence that the accused's conduct during the course of the state court proceeding violated DR 1-102(A)(4).

IV. SANCTION

We now determine an appropriate sanction for the accused's misconduct. This court follows a well-established methodology in determining the appropriate sanction for violations of the disciplinary rules. *See In re Wittemyer,* 328 Or 448, 459-61, 980 P2d 148 (1999) (determining sanction after reviewing duty violated, mental state, and injury, and noting that sanction may be adjusted based upon aggravating and mitigating circumstances, as well as the court's case law). Consistently with that methodology, we refer to the American Bar Association's *Standards for*

Imposing Lawyer Sanctions (1991) (amended 1992) (ABA Standards) and Oregon case law.

A. *Duty Violated*

Under ABA Standard 6.2, a lawyer has a duty to "expedite litigation" and "bring a meritorious claim." In this case, the accused brought claims that lacked merit and continued to pursue those claims long after it would have been apparent to any reasonable lawyer that the claims were exceedingly weak and that it was not in his clients' best interest to pursue them. He conducted the state court litigation in an irresponsible and amateurish manner to the prejudice of his clients. Furthermore, in filing the unwanted objections and memorandum in the Nutts' bankruptcy proceeding, the accused violated a duty to the legal system and to the profession to avoid causing interference with a legal proceeding. ABA Standard 6.22.

B. *Mental State*

The ABA Standards define the mental state of "knowledge" as the conscious awareness of the nature or attendant circumstances of particular conduct, but without the conscious objective or purpose to accomplish a particular result. ABA Standards at 7. "Negligence," in turn, is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.* The ABA Standards define the mental state of "intent" as "the conscious objective or purpose to accomplish a particular result." *Id.*

The trial panel briefly addressed the issue of mental state and concluded that the accused's actions during the Nutts' bankruptcy proceeding were "knowing." Because the trial panel did not find that the accused's actions in the state court proceeding violated DR 1-102(A)(4), it did not make the corresponding mental state determination respecting that proceeding. Although the Bar agrees that the accused acted "at least knowingly," the Bar also contends that the accused acted "at times intentionally."

As previously stated, the accused knew that the damage claims that he asserted on the Nutts' behalf were at best weak and at worst lacked any factual foundation. That deficiency was repeatedly pointed out to him by the court, but the accused refused to amend the Nutts' complaint to comply with the court's demands. Additionally, the accused knew that he was required by court rules to confer with opposing counsel, but he continually failed or refused to do so. The trial court, in one instance, informed the accused that his motions to compel were not properly before the court until he conferred with opposing counsel. The accused responded by filing certificates with the court that misrepresented his compliance.

Regarding the Nutts' bankruptcy proceeding, the accused was aware that he was not the attorney of record. Furthermore, the accused knew that the Nutts were adamant in their desire not to object to the proposed settlement and that they did not consent to the accused's objection. Despite that knowledge, the accused nevertheless proceeded to file a second unauthorized objection in the Nutts' bankruptcy proceeding.

Based on the foregoing, we conclude that the accused acted knowingly in both the state court and the bankruptcy proceedings. We conclude, however, that there is not clear and convincing evidence that the accused had "the conscious objective or purpose" to ruin the Nutts financially or to unnecessarily make a "mess" of the state court and bankruptcy proceedings, as the Bar argues.

C. *Injury Sustained*

"[A]n injury need not be actual, but only potential, in order to support the imposition of a sanction." *In re Williams,* 314 Or 530, 547, 840 P2d 1280 (1992). Injury is any actual harm, from "serious" injury to "little or no" injury. ABA Standards at 13. Potential injury is harm that was reasonably foreseeable at the time of the violation but that ultimately did not occur. *Id.* Because the actual damage to the Nutts and the court system was significant, we need not consider potential injury.

Here, the accused's clients, the Nutts, began their litigation with hopes of moving into their retirement home. Before that litigation was concluded, the Nutts were forced to file for bankruptcy. Although he was not the attorney of record, the accused continued to harm the Nutts by involving himself in their bankruptcy proceeding, undermining the Nutts' objectives in the process. Additionally, the named defendants in the state court proceeding incurred tens of thousands of dollars in attorney fees based on claims that ultimately were found to be meritless as a matter of law. A significant part of those attorney fees was attributable to the accused's failure to amend the pleadings as instructed. Finally, the accused's misconduct

served to harm the court system itself by subjecting it to numerous and unnecessary hearings.

D. *Preliminary Sanction Under ABA Standards*

As noted above, the accused knowingly violated his duty to the legal system and to the legal profession. As previously discussed, the ABA Standards suggest that a suspension is the appropriate sanction for such conduct. *See* ABA Standard 6.22. We now examine the aggravating and mitigating factors present here, as well as Oregon case law, to determine the appropriate sanction.

E. *Aggravating and Mitigating Factors*

"[A]ggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed." ABA Standard 9.21. We conclude that the following aggravating factors are present. First, the accused, who was admitted to the Oregon Bar in 1973, has "substantial experience in the practice of law." ABA Standard 9.22(i). Second, the accused's refusal to acknowledge the wrongful nature of his conduct in the bankruptcy proceeding is also an aggravating factor, in that no reasonable lawyer could argue that the unauthorized objections that he filed were appropriate. ABA Standard 9.22(g); *see In re Meyer,* 328 Or 211, 218, 970 P2d 652 (1999) (using and explaining that standard).

In addition to those aggravating factors, the Bar argues that the accused's pattern of misconduct should be taken into account in determining the severity of the sanction in this case. Under the circumstances here, we agree. The harm caused in this case did not derive from an isolated incident. Rather, the harm derived from the

accused's multiple failures throughout the course of the state court and bankruptcy proceedings. *See In re Jaffee*, 331 Or 398, 411, 15 P3d 533 (2000) (finding a "pattern of misconduct" based on four separate episodes of misconduct).[5]

"[M]itigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." ABA Standard 9.31. The Bar admits that a delay in pursuing the matter is a mitigating factor here. ABA Standard 9.32(j). The length of the delay was significant, in that it took the Bar three and one-half years from the time of the original complaint to bring this matter to a formal proceeding. Also mitigating the sanction is the absence of evidence that the accused acted with a dishonest or selfish motive. ABA Standard 9.32(b).

F. *Oregon Case Law*

We turn to this court's case law. Although no case law is precisely on point, several cases nevertheless offer guidance.

In *In re White*, 311 Or 573, 815 P2d 1257 (1991), the accused lawyer engaged in actions similar to those of the accused, including filing repetitive claims and failing to

[5] In *In re Paulson*, 335 Or 436, 438, 71 P3d 60 (2003), this court held that the accused violated Disciplinary Rule 2-106(A) by billing a client for time spent responding to the client's complaint to the Bar against the accused. In this proceeding, the trial panel did not consider the accused's previous reprimand to be an aggravating factor because that reprimand had been imposed after the events relevant to this second proceeding against the accused. The Bar does not contest that conclusion, and we do not consider that earlier proceeding in aggravation here.

appear at hearings without notice to the trial court or opposing counsel. This court concluded that that conduct violated DR 1-102(A)(4). In that case, however, the court focused on the violation of DR 1-102(A)(4) as well as additional violations when imposing a three-year suspension from the practice of law.

Similarly, in *In re Stauffer,* 327 Or 44, 956 P2d 967 (1998), the accused lawyer pursued a former client through various courts in an attempt to collect an attorney fee. Ultimately, this court found that the lawyer had used the probate and bankruptcy courts as mere tools in his efforts to pursue attorney fees. This court stated that the result was a "staggering amount of unnecessary litigation and the multi-year probate of an essentially no-asset estate, which should have been closed promptly," and concluded that the accused lawyer's conduct had violated DR 1-102(A)(4), along with several other rules. *Id.* at 61. This court imposed a two-year suspension from the practice of law.

The above-described cases concerned various acts of lawyer misconduct that, in turn, constituted multiple violations. The following cases deal with isolated acts that were held to violate only DR 1-102(A)(4). In *In re Meyer,* 328 Or 211, 970 P2d 652 (1999) , for example this court suspended a lawyer for 90 days after the lawyer had appeared at a DMV hearing while intoxicated. In *In re Thompson,* 325 Or 467, 940 P2d 512 (1997), this court suspended a lawyer for 63 days after he confronted an appellate judge about a recently issued decision.

Here, the accused's conduct in both the Nutts' state court and bankruptcy court proceedings constituted violations of DR 1-102(A)(4). Although the accused's

actions were more severe than the misconduct in *Meyer* and *Thompson,* they do not, in our view, rise to the level at issue in the *White* and *Stauffer* matters. We conclude that the accused's conduct, together with the applicable aggravating and mitigating factors, warrants a suspension of six months.

The accused is suspended from the practice of law for six months, commencing 60 days from the effective date of this decision.

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re: Complaint as to the Conduct of LAUREN J. PAULSON, Accused.	)	Case No. 01-100 OREGON STATE BAR'S TRIAL MEMORANDUM

STATEMENT OF FACTS

In 1997 Jerry and Phyllis Nutt sold their home in Aloha and purchased a modular home for installation in Hebo, Oregon. Mr. Nutt was a retired elementary school teacher and Mrs. Nutt was a retired hospital receptionist, and they intended to move to Hebo for their retirement.

The Nutts purchased their home from American Modular Homes. The installation of the home was to be supervised by Don Olson, who was associated with American Modular Homes as an independent salesman. Olson referred the Nutts to Mark Gensman, a mortgage broker, for construction financing. Gensman met with the Nutts and arranged for a construction loan to pay for the modular home and install it. The Nutts signed the loan documents on or about May 16, 1997. The loan was to be paid in full by October 1, 1997, and the Nutts expected to obtain permanent financing to pay off the construction loan when their home was installed. The construction loan included a provision for a holdback in escrow of $10,000 to be used to pay any liens on the Nutts' Hebo property. The lender for the construction loan was Septem, LP, a mortgage company owned by Frank Boresek.

Some of the features of the modular home were not what the Nutts had ordered, and there were delays and defects in installation. Ultimately, Don Olson stopped working on the installation. By October 20, 1997, the construction loan was in default, and the installation of the home was not complete.

The Nutts felt they might need a lawyer to help them deal with the situation, but did not know how to go about finding a lawyer or what a lawyer could or should do for them under the circumstances. Lauren Paulson, the Accused, had represented the buyers of the Nutts' home in Aloha, and the buyers were satisfied with how he had handled the transaction. The Nutts then procured a brochure the Accused used to advise potential clients of his professional qualifications. (Ex. 61) After reading the brochure, the Nutts decided to consult with the Accused.

On October 20, 1997, the Nutts signed an hourly fee agreement with the Accused for his services. (Ex. 62) When they employed the Accused, all the Nutts wanted was to complete the installation of their home in Hebo so they could obtain permanent financing. The Accused went to the Nutts' Hebo home and asked them for all the documents they had that related to the installation and all of their loan documents. When the Nutts told the Accused they had no loan documents, the Accused told them that they had a big case against their mortgage broker (Gensman and his corporation, BRG) and their construction lender (Boresek and his mortgage company, Septem). At that time – and many times during Paulson's representation of them – Phyllis Nutt told the Accused that she and her husband did not want to pay large sums in attorney fees and all they wanted to accomplish was the completion of their home.

The Accused met with Don Olson and representatives of American Modular Homes in November 1997. At that meeting, it was agreed that the tasks necessary to complete the installation of the home would be done within 10 days. On November 28, 1997, by letter, the Accused confirmed this agreement and advised Olson of the Nutts' claim for damages that arose out of the delays in installation. (Ex. 64) These damages totaled approximately $14,000, $7,500 of which was comprised of attorney fees ($2,500) and "consequential damages" for the inconvenience to the Nutts occasioned by the delays in installation ($5,000). The November 28, 1997 damage claim was based on a November 20, 1997 letter from the Nutts in which they had itemized the damages to which they felt they were entitled. (Ex. 63)

The installation of the Nutts' home was not completed as agreed in November 1997, and by December Don Olson had left Oregon. At this time, the Nutts still sought only to complete their home. To pay for this project, they wanted access to the $10,000 escrow holdback, which they believed Olson had taken when he left Oregon. The Accused undertook to negotiate an agreement by Olson to release any claim he might have to the holdback. (Exs. 65, 66)

While the Accused was attempting to negotiate with Olson's lawyer, he was also advising the Nutts that Gensman and Septem had committed egregious violations of the federal Truth in Lending Act and various Oregon laws. The Nutts did not want to be parties to a lawsuit and told the Accused so on several occasions. Nevertheless, the Accused convinced the Nutts that the violations of law he claimed had been committed by their lender and mortgage broker were so serious that they – as good citizens – should sue to make sure what had happened to them did

not happen to anyone else. On February 4, 1998, the Accused offered to pursue litigation against Olson, American Modular Homes, Gensman, BRG, Septem, and Boresek on a contingent fee basis. The Nutts signed a contingent fee agreement on that day but made it clear that they could not afford to keep paying the Accused's hourly fees and did not want to end up having to pay any other party's attorney fees. (Ex. 69)

The Accused then drafted a complaint to be filed in circuit court. In that complaint, he alleged seven claims for relief against Olson, BRG, Gensman, American Modular Homes, Septem, and Boresek that claimed the Nutts had been damaged in amounts the Accused had calculated at between $100,000 and $500,000, plus an unspecified amount of punitive damages. The claims against Gensman, BRG, Septem and Boresek alleged failure to make disclosure of certain information relating to the terms of the loan under the federal Truth in Lending Act (TILA), the Oregon Lender Law, and the Oregon Unlawful Trade Practices Act (UTPA), and fraud for the same failure to make disclosures. (Ex. 3) The Nutts were shocked when they saw how much money they would be asking to recover and told the Accused so. However, they were admittedly naive about what a lawyer was supposed to do for them and how much control over their lawyer they could exercise. Accordingly, when the Accused explained that lawyers always set damages in pleadings high so they would be assured to recover everything to which their clients were entitled, the Nutts believed him and consented to filing the complaint. However, Phyllis Nutt told the Accused that if the litigation "got out of hand" he was to stop it. The Nutts never knew how the

Accused calculated the damages for their lawsuit, and the Accused has never been able to articulate his calculation.

The lawsuit was filed on April 23, 1998. (Ex. 3) Gensman and his mortgage brokerage, BRG, were represented by Steven Berman and John Dunbar of the Ball Janik law firm. Gensman had signed an indemnity agreement with Septem and Boresek, so his lawyers took the lead in defending the Nutts' suit. Septem and Boresek were represented by Matthew Patton of the Herschner, Hunter law firm. American Modular Homes was out of business by this time, and Olson was in California.

Before they made an appearance in the lawsuit, Berman and Dunbar evaluated the Nutts' claim against Gensman and Septem. They concluded that *at most* the Nutts might be entitled to recover a portion of their loan fees from Gensman.[1] They determined that most of the claims the Accused had alleged against Gensman had no substantive merit, were improperly plead, that the Accused had not articulated grounds for the damages he was requesting, and that the Accused had not followed the statutory requirements for pleading punitive damages.

Within two weeks after Gensman was served with the complaint, Berman advised the Accused that he was representing Gensman. (Ex. 70) The next day, June 3, 1998, Berman wrote the Accused and asked him who was representing the other defendants. Berman also asked the accused to call him to discuss the issues in the case. (Ex. 71) The Accused did neither and failed to respond to

[1] The total amount of loan fees was less than $3,000.

Berman's subsequent attempts to speak to him on the telephone.

Because he had not heard from the Accused, on June 15, 1998, Berman wrote to the Accused and again asked for the names of the other defense counsel. In this letter, Berman also discussed in detail how the Accused's complaint failed properly to allege claims against Gensman, failed to allege damages, and failed to state a claim for punitive damages. Finally, Berman advised the Accused that his client was seeking a speedy resolution of the case and asked the Accused to give him a reasonable assessment of what the Nutts thought they were entitled to recover from Gensman. (Ex. 1 page 1460-4 or Ex. 72)

The Accused's response to Berman's June 15 letter set the tone for the litigation. He did not send the Nutts a copy of Berman's letter before he faxed a reply dated June 17, 1998, which read:

> "I am sitting here feeling real pouty. I called you and you did not return my call. I am sending a copy of this letter to my clients so they know that I am on the ball and you are not.
>
> "Now, where were we . . . oh yeah, . . . you wanted to talk about a palatable business solution to this matter. Is that one your clients can swallow?
>
> "I'm always in a real good frame of mind about discussing settlement after getting a letter like yours dated June 15, 1998. Let's talk. But, where to begin.?"
>
> (Ex. 1 page 1465 or Ex. 73)

The Accused sent this letter between a telephone call he made to Berman at 5:02 p.m. on June 17, 1998, and Berman's return call at 5:20 p.m. that same day. (Ex. 1, page 1465 or Ex. 73) The Accused did not answer Berman's call, so Berman left a message asking the Accused to return his call. The Accused did not. On June 18, Berman advised the Accused that he would assume the Accused did not wish to confer about his June 15 objections to the Accused's complaint as required by the court rules and that he would file motions to correct the deficiencies in the complaint. (Ex. 1, page 123 or Ex. 74)

On August 11, 1998, Berman reached the Accused by telephone and for a second time asked him for an estimate of damages. (Ex. 1 page 1467 or Ex. 75) The Accused promised he would make the estimate within a week. He also promised that within a week he would consider whether he needed to amend his complaint. He did not keep his promises or send the Nutts a copy of the August 12, 1998 letter in which Berman had confirmed his August 11 promises. Instead, on August 12, 1998, the Accused noticed Berman and Patton (Septem's counsel) that he intended to apply for an order of default against their clients. (Ex. 1 page 169)

On September 4, 1998, Berman sent the Accused two discovery requests: a request for admissions and a request for production of documents. (Ex 1 pages 135 and 140 or Exs. 4 and 5) In the letter that accompanied those discovery requests, Berman reminded the Accused that he had not yet given him an estimate of damages or advised him if it would be necessary to file formal motions to correct the deficiencies in his complaint. Berman also advised the Accused that the manner in which the Nutts were pursuing their lawsuit was having a detrimental effect on

Gensman's mortgage brokerage business (BRG) and that Gensman would pursue all his legal remedies – including possible counterclaims – if the Nutts did not stop pursuing their claims. Despite the fact that the Accused's conduct of the litigation was causing damages to this client, Berman expressed Gensman's desire to resolve the case quickly and for a third time asked for a settlement proposal. (Ex. 1 page 1466 or Ex. 78) The Accused did not send a copy of Berman's September 4 letter to the Nutts and did not respond to it.

On September 5, 1998, the Nutts sent the Accused a letter that included their estimate of damages. The Nutts identified $4,917.88 in construction-related damages, $6,002.99 in damages they felt were caused by Gensman, and $6,000 in attorney's fees. They also asked for $25,000 in "consequential damages" from Olson and American Modular Homes and $65,000 in "consequential damages" from Gensman and BRG for "undue stress, frustration, and possible loss of health."[2] (Ex. 79)

Even though he had received this information from the Nutts five weeks earlier, the Accused did not respond to Berman's settlement overtures until October 16, 1998, when he made a demand of $14,402.99 in "actual damages" and $20,000 in "general damages," for a total of $34,402.99. Over half of the "actual damages" ($7,500) represented attorney fees. (Ex. 1 pages 1468-9 or Ex. 82) The Accused concluded his October 16, 1998 letter to Berman with the following paragraph:

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[2] The Nutts will testify that they do not know what consequential damages are or whether they were entitled to recover them.

> "Mr. and Mrs. Nutt had their retirement home dream turn into a nightmare. Their plight was compounded by the actions of your clients recounted above. They are prepared to make one attempt at resolving this matter, and only one attempt. If their demand for settlement is not agreed to within 20 days of the date of this letter than there will be no further negotiations and the matter will be decided upon by a Multnomah County jury. The Nutts will settle this matter for $20,000 general damages plus the sums outlined above for a total of $34,402.99. I look forward to hearing from you within the time mentioned. This amount is fixed this low at their request to attempt to resolve the matter now. A counteroffer will immediately terminate negotiations."

The Nutts did not see the Accused's October 16, 1998 letter before it was mailed to Berman, and they had not agreed that their first offer would be a one-time only, "take it or leave it" offer. On October 16, 1998, they remained interested only in obtaining enough money to complete their home without protracted litigation and the associated costs.

The Accused did not timely respond to Berman's September 4 request for production, did not advise Berman that he needed additional time to respond to it, and did not respond to Berman's letters in which he had attempted to confer with the Accused about his responses to the September discovery requests. (Ex. 1 pages 152-3 or Ex. 81) As a result, on October 15, 1998, Berman filed a Motion to Compel Production of Documents, a motion for attorney fees, and the Rule 21 motions to correct the deficiencies in the complaint about which he had notified the Accused four months earlier. (Ex. 1 pages 46-7; 56-126

and 127-155 or Ex. 6) The Accused did not ask the Nutts to respond to Berman's request for production of documents until October 16: a day after Berman filed his motion to compel production. (Ex. 83) Argument on Berman's motions was set for November 12, 1998 before Judge Bearden.

Berman served the Accused with a Second Request for Production of Documents on November 3, 1998. (Ex. 1, page 395 or Ex. 8) The Accused did not respond to this request, tell the Nutts that he had received it, or ask the Nutts to provide him with the requested documents.

By letter dated November 6, 1998, Berman reminded the Accused that the Nutts would be liable for Gensman's attorney fees should Gensman prevail in the law suit. (Ex.86) When he received this letter, the Accused told the Nutts that Berman was threatening them with an attorney fee award. Phyllis Nutt, upset by this prospect, told the Accused that she did not want him to get them into anything that would expose them to an attorney fee judgment. The Accused dismissed her concerns, telling her that this kind of threat was just something that lawyers did and that there was no way the Nutts would have to pay the other parties' attorney fees.

It was not until November 10, 1998 – two days before the argument on Berman's motions – that the Accused filed his response to Berman's Motion to Compel Production of Documents. In support of his response to the First Motion to Compel Production, the Accused signed an affidavit in which he represented that Jerry Nutt had recently had complex surgery and was suffering from a chronic "health situation" which had prevented him from compiling the documents Berman had requested. (Ex. 1

page 26 or Ex. 7) These representations were not true. The Nutts will testify that although Jerry Nutt did have some serious health problems, these problems did not prevent him from responding promptly to *every* request the Accused had ever made of him for documents or other information. The truth of the matter was that Jerry Nutt had not had any recent surgery, the Nutts had already given the Accused most, if not all, of the documents Berman had requested, and the Accused had not asked them to compile any documents until after Berman filed his motion to compel production.

The Accused also waited until November 10, 1998 to file his response to Berman's Rule 21 motions. (Ex. 1 page 19) In that response, the Accused agreed that one of the claims for relief he had alleged did not even apply to Berman's clients and that he should be required to more specifically plead his claim for fraud damages.

Judge Bearden heard argument on Berman's motions on November 12, 1998 and granted Berman's motion to Compel Production of Documents. Judge Bearden also struck from the complaint the Accused's allegations of damages under the federal Truth in Lending Act (TILA) and the Oregon Lender Law as sham[3] and struck the Accused's claim for punitive damages under the Oregon Ulnawful Trade Practices Act (UTPA). (Ex. 1 page 11 or Ex. 45)

On November 17, 1998, Berman made his fourth settlement overture. (Ex. 1 page 1470 or Ex. 87) In a letter, he reminded the Accused that if Gensman were to

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[3] "Sham" is defined by case law as: a pleading that is false in fact. *Andrysek v. Andrysek*, 280 Or 61, 69 n 8, 569 P2d 615 (1977).

prevail at trial, he would be entitled to payment of his attorney fees by the Nutts. Berman then made a settlement offer to the Nutts. The offer included payment of the sum of $2,000 – the equivalent of the loan origination and processing fees the Nutts had paid – and a waiver of Gensman's right to demand that the Nutts pay his attorney fees if he prevailed at trial. By November 17, 1998, Ball Janik's fees were about $8,250, and Herschner, Hunter's fees were about $1,100. (Ex. 1 pages 1499 and 2201 or Exs. 43 and 44) Thus, Berman's first offer to the Nutts was worth $11,350.

The Accused did not send the Nutts a copy of Berman's November 17, 1998 offer or otherwise advise them of its terms before he rejected it by letter dated November 18, 1998. (Ex. 1 page 1472 or Ex. 88) In his November 18 letter, the Accused wrote:

> "Your offer to settle for $2,000 is late. My clients have authorized me to reject this nuisance offer. There is no counteroffer, nor will there be one. We will not engage in any further negotiations."

The Nutts' depositions were set for and took place the next day, November 19, 1998. At that time, Judge Bearden had ruled[4] that the Accused had not alleged facts that supported his claims of damages of up to $500,000. Berman had no information that gave him any idea of why the damage claims in the complaint were so high. However, the Accused had told Berman that when he filed an amended complaint – as he was now required by Judge Bearden's rulings to do – he intended to include allegations

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[4] The judge signed the order formalizing this ruling until November 23, 1998. (Ex. 1 page 11)

that Gensman's conduct had exacerbated Jerry Nutt's medical condition. The Accused had also claimed Jerry Nutt's medical condition as an excuse for not complying with Berman's discovery requests. Because of the Accused's prior statements, Berman believed that Jerry Nutt's medical condition was relevant to the Accused's calculation of damages.

The Accused did not adequately prepare the Nutts for their depositions, but told them that he would intervene on their behalf if Berman asked them anything he should not. Jerry Nutt testified that the modular home in Hebo was and had been intended to be the Nutts' primary and permanent residence. (Ex. 1 page 837) Phyllis could not testify how the damage amounts claimed in the law suit were calculated, except to say that she and her husband had discussed damages with the Accused and had agreed upon the figures in the complaint. (Ex. 1 pages 811-822) When Berman asked Phyllis about her medical condition, the Accused instructed her not to answer. (Ex. 1 page 809) Likewise, he instructed Jerry not to answer any questions about his health. (Ex. 1 pages 899-901) Jerry also testified that he could not say offhand how much damage Gensman had caused, but it was less than $50,000, and that he was not aware that the claims for relief the Accused had asserted against Gensman included prevailing party attorney fees. (Ex. 1 pages 896, 911-12, and 918)

When the depositions were over, the Nutts were upset and embarrassed by what they perceived as the Accused's confrontational style and by his refusal to allow them to answer questions about their medical conditions. They felt they had nothing to hide and wanted the court to know how the stress produced by the defendants' actions had exacerbated their conditions.

On December 7, 1998, Berman wrote the Accused and proposed that the parties take the case to a settlement conference before a Multnomah County settlement judge. (Ex. 1 page 1473 or Ex. 90) The Accused never responded to this proposal, nor did he ever make his own proposal for alternate dispute resolution at any time before trial. The Nutts would have eagerly participated in a settlement conference had they known they had this option, but the Accused never informed the Nutts that Gensman had asked them to participate in one.

On December 10, 1998, the Accused filed his First Amended Complaint in response to Judge Bearden's having stricken portions of his Complaint. (Ex 1 pages 445-60 or Ex. 9) On December 16, in an attempt to confer with the Accused before filing a second set of Rule 21 motions, Berman wrote the Accused and expressed his concerns that the Accused had again not alleged any factual basis for his damage claims under TILA and UTPA and had not repled the fraud claim as Judge Bearden had ordered. Berman also pointed out that the Accused asked for damages in his prayer on claims in which BRG and Gensman were not named as defendants and that he had alleged as elements of damages alleged conduct by Gensman directed toward the Accused rather than his clients.[5] (Ex. 1 page 264 or Ex. 91) The Accused did not respond to Berman's December 10 letter.

On December 18, 1998, Septem and Boresek filed an Answer that included a counterclaim for attorney fees and

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[5] The Accused was alleging that the Nutts were somehow damaged by Gensman having filed a complaint with the Bar about the Accused's conduct and allegedly threatening him.

costs under TILA and the Oregon Lender Law. (Ex. 1 pages 440-3) This Answer exposed the Nutts to liability for any attorney fees incurred by Septem and Boresek, in addition to any attorney fees incurred by Gensman and BRG.

Having heard nothing from the Accused in response to his Second Request for Production or his December 10, 1998 letter concerning the sufficiency of the First Amended Complaint, Berman wrote the Accused on December 31, 1998 asking for the documents he had requested in early November and for some indication of whether the Accused intended to remedy the deficiencies in the First Amended Complaint. (Ex. 1 page 400 or Ex. 92) The Accused did not respond.

As 1998 came to a close, the lawsuit had been pending for 8 months. Gensman's attorney fees were mounting, and Berman was making no progress in his attempts to either settle the case or determine whether there were facts sufficient to support the legal claims the Nutts were bringing against his clients. Accordingly, on January 20, 1999, Berman filed a second set of Rule 21 motions that raised many of the same objections to the First Amended Complaint as he had raised against the Complaint, a Motion for Partial Summary Judgment, and a motion for attorney fees. (Ex. 1 pages 404-22, 423-33, 434-5, and 438-42 or Ex. 11) The summary judgment motion put at issue the Nutts' right to and the amount of damages in three of the four claims for relief alleged against Gensman in the First Amended Complaint. (Ex. 1 pages 404-22 or Ex. 10) Berman's Rule 21 motions and summary judgment motion were properly supported by evidence, including excerpts from the Nutts' deposition transcripts. (Ex 1 pages 246-403 or Exs. 10 and 11).

The Accused filed his response to Berman's summary judgment motion and Rule 21 motions on February 12, 1999. (Ex. 1 pages 669-91 or Exs. 12 and 13) In his response to the summary judgment motion, the Accused represented to the court that the Nutts intended their modular home to be their residence in their retirement. (Ex. 1 page 673 or Ex. 12) He also represented that he would again amend the First Amended Complaint to make the fraud claim more specific (Ex. 1 page 681 or Ex. 12) The Accused supported his response to the summary judgment motion with an affidavit dated February 18, 1999, that he had drafted for the Nutts to sign. (Ex. 1 pages 646-50 or Ex. 14) In that affidavit, the Nutts claimed that in their deposition they had stated that they "were harmed a lot financially" and had referred Berman to the Accused to ascertain the specific nature of their financial damages. (Ex. 1 page 648) They also stated that Gensman's conduct caused them to suffer "severe physical and mental distress" and "emotional and physical stress that ultimately caused physical ramifications." (Ex. 1 page 649)

Berman filed his replies in support of his summary judgment motion and Rule 21 motions on February 24, 1999. (Ex. 1 pages 594-645 or Exs. 15 and 16) It is clear from these documents that Berman was challenging the sufficiency of and evidence to support the Nutts' claims of damages. He also called to the court's attention the fact that in the Nutts' February 18, 1999 affidavit, and in the Accused's attempt to excuse his failure to produce documents, the Accused and the Nutts had claimed physical and emotional damages, but the Accused had refused to allow the Nutts to testify at their depositions about the nature and extent of these damages.

The court set July 1, 1999 as the date for trial. On March 15, 1999, the Accused made his First Request for Production of Documents from Gensman. This document included requests for 29 different types of documents. (Ex. 1 pages 722-7 or Ex. 17) At the time he made this request, the law suit had been pending for 11 months, and argument on Berman's second Rule 21 motion and motions for summary judgment motions was set for that day. Trial was only four months away, and the Accused was just beginning to seek discovery from Gensman. He had not yet sought any discovery from Septem.

On April 14, 1999, the Accused wrote Berman and informed him that the next day he would appear *ex parte* and move to reinstate his case against Olson.[6] (Ex. 93) Fearing that reinstating Olson to the case might delay the trial, Berman appeared at *ex parte* time to oppose the motions. Upon seeing Berman, the Accused did not offer his motions, told Berman that he did not care about the inconvenience he had caused him, and represented that he had not signed the April 14 letter because he had not been in his office that day. (Ex. 94) Berman noted, however, that the Accused *had* signed his affidavit in support of his motions on April 14, and his paralegal, Brenda Tiland, had notarized it that day. (Ex. 1 page 511-12) After the April 15 appearance, Berman wrote the Accused and advised him that he would oppose any attempts to delay the trial date. (Ex. 94)

On April 15, 1999, Berman also filed his responses to the 29 requests for production the Accused had made on

[6] Olson had been dismissed as a party to the law suit by the court because the Accused had failed to serve him with the complaint.

March 15, 1999. Berman objected to most of the Accused's requests as overbroad and unduly burdensome, but offered to produce documents related to the Nutt transaction subject to a protective order and after the court had ruled on the summary judgment motions. (Ex. 1 pages 728-36 or Ex. 18). When he received Berman's response, the Accused did not take any steps to make arrangements with Berman for acceptable conditions for the production of documents or make any other effort to communicate with him about his discovery requests.

On April 26, 1999, Patton made a settlement overture on behalf of Septem and Boresek. (Ex. 1 page 2233 or Ex. 96) Patton offered payment of the sum of $1,000 and a waiver of Septem's attorney fees. As of April 26, 1999, Herschner, Hunter's fees were approximately $4,600, making this offer worth about $5,600. (Ex. 44) The Accused did not respond to Patton's offer. Instead, on April 27, 1999, he sent Patton a Second Request for Production that asked for 17 types of documents. (Ex. 1 pages 712 and 2235 or Ex. 20) The Accused did not show Patton's offer to the Nutts before he rejected it and did not make them aware that Patton was intending to seek summary judgment and attorney fees if the case against his clients did not settle.

Berman's motions for summary judgment were argued in five separate appearances before Judge Nely Johnson: on March 15, 1999; March 19, 1999; April 21, 1999; June 9, 1999; and June 16, 1999. At the March 15 hearing, Judge Johnson granted Berman's motion on the TILA claim, ruling that TILA did not apply to Gensman and BRG. (Ex. 46, page 14). At the March 19, 1999 hearing, Judge Johnson granted Berman's motion on the Oregon Lender Law claim, ruling that Gensman had made the

proper disclosures to the Nutts about their loan transaction, except as concerned their right to rescind the transaction. (Ex. 47, page 67) This latter issue was brought up by the Accused for the first time at argument on March 19 – he had not pled or otherwise alluded to it in the 11 months the litigation had been pending. Judge Johnson left this issue open for further argument on the factual record that was before her at that time. (Ex. 47 pages 102 and 114) Judge Johnson also noted on March 19 that the Accused had failed to plead that the Nutts had incurred any damages under the UTPA and had failed to follow the proper procedures that would allow him to ask for punitive damages. (Ex. 47 page 81) The Accused agreed that he needed to "rush off and amend my pleadings." (Ex. 47 page 85) By March 19, then, the Accused knew he could not proceed against Gensman under TILA, that there was only one viable issue remaining under the Oregon Lender Law, that he had not alleged more than $200 in damages under the UTPA, and that he had not followed the proper procedures for alleging punitive damages.

On April 20, 1999, the Accused took the Nutts to the courthouse for an appearance before Judge Henry Kantor in order to obtain a judgment against American Modular Homes, which had not filed an appearance in the litigation. When he appeared before Judge Kantor, the Accused had not obtained an order of default against American Modular Homes from the presiding judge as he was required by court rule to do. (Ex. 1 page 502 or Ex. 48) Instead, he asked Judge Kantor to sign the order of default. The judge only reluctantly signed the order, but told the Accused he did not know if it was valid. (Ex. 48 page 25) He then invited the Accused to present a *prima facie* case on the issue of damages. The Accused was

unable to articulate any basis for his request for $250,000 in damages for breach of contract or for his request for $500,000 in damages for fraud, even after instruction by the judge about what might constitute damages. In fact, he could not articulate *any* basis for damages over $100,000. (Ex. 48 pages 27-31) Then, the Accused offered Jerry Nutt's testimony about damages. The Accused had not prepared Mr. Nutt to testify, and Mr. Nutt was only able to articulate $6,000 to $15,000 in damages attributable to American Modular Homes. (Ex. 49 pages 35-6)

On the evidence before him, Judge Kantor offered to sign a judgment against American Modular Homes for $20,000. Realizing that amount might not be satisfactory to the Nutts, the judge also offered to allow evidence of damages to be submitted by affidavit. (Ex. 48 pages 37-8) The Accused then had Jerry Nutt sign an affidavit that made only conclusory statements about damages and submitted it to the court along with a proposed form of judgment for $700,000 plus $14,655 in attorney fees. (Ex. 2) Judge Kantor refused to rely on the conclusions about damages stated in Mr. Nutt's affidavit, and returned the affidavit and the proposed form of judgment to the Accused. (Ex. 2)

On April 21, 1999, Judge Johnson ruled that the Accused had not offered sufficient evidence that Gensman had committed fraud and granted Berman's motion for summary judgment on that claim. (Ex. 49 page 105) As to the remaining issue under the Oregon Lender Law, the Accused had, contrary to Judge Johnson's instructions on March 19, submitted an unsigned affidavit (later signed on May 5, 1999) by the Nutts that claimed the modular home was not to be their principal dwelling. (Ex. 1 pages 487 and 945) This representation was in direct contradiction to

the Nutts' prior sworn statements and pleadings, and Judge Johnson refused to consider it. (Ex. 49 page 114)

By April 21, 1999, the Accused knew that he had no fraud or TILA claim against Gensman, only one possible non-disclosure under the Oregon Lender Law, and a UTPA claim of only $200. At this time, the Accused also knew that when Judge Johnson dismissed the Nutts' TILA claim, Gensman became *entitled* to a judgment against the Nutts for attorney fees. The Accused did not explain the significance of Judge Johnson's rulings on Gensman's summary judgment motions to the Nutts.

On May 11, 1999, Matthew Patton filed a motion for summary judgment, arguing that Judge Johnson's prior rulings on the TILA, fraud, and Oregon Lender Law claims against Gensman required summary judgment in favor of Septem and Boresek on these claims. Patton also argued that the UTPA did not apply to his clients as lenders of money. (Ex. 1 pages 1787-92 or Ex. 21)

John Dunbar made a fifth settlement overture on May 18, 1999, even though Judge Johnson had dismissed the fraud and TILA claims against his clients, had dismissed all but one issue under the Oregon Lender Law and had limited the Nutts' damages under the UTPA to $200. Dunbar, seeking to avoid the considerable expense to his client of a circuit court trial on a $200 claim, offered the Nutts the sum of $2,500 and a waiver of Gensman's right to collect his attorney fees from them. As of May 18, 1999, Ball Janik's fees were approximately $22,413, making this offer worth almost $25,000. (Ex. 1 page 1499 or Ex. 44) The Accused did not advise the Nutts of this offer before he rejected it and did not make it clear to them that the outcome of Gensman's summary judgment motions had

made it *certain* that they would have to pay some or all of Gensman's attorney fees.

On May 24, 1999, Patton responded to the Accused's Second Request for Production (Ex. 20), objecting to most of the Accused's 17 requests as unduly burdensome and overly broad, but agreeing to provide unprivileged documents relating to the Nutt transaction if the court denied his motions for summary judgment. (Ex. 1 pages 712-16) The Accused did not contact Patton about his response or attempt to confer with him about how to resolve the issues raised by Patton's response to the request for production.

Instead, on June 9, 1999 – less than a month before trial – the Accused filed motions to compel Gensman and Septem to produce the documents he had requested. (Ex. 1 pages 704-6 and 719-21 or Exs. 28 and 29) On June 9, 1999, the Accused also filed with the court two certificates of compliance which stated that he had made a good faith attempt to confer with Berman and Patton regarding his requests for production. (Ex. 1 pages 739-42 or Ex. 31) The evidence will show that the Accused did not, in fact, make any attempt to confer with the lawyers for either Gensman or Septem.

On June 6, 1999, the Accused moved to postpone the July 1 trial date. The reasons the Accused cited to justify a set-over were substantially his own fault: that no default judgment had been taken against American Modular Homes; that summary judgment motions were still pending; that a Rule 21 motion was still pending; that he had not taken the depositions of Gensman and Boresek and there were motions to compel production pending; and that he had not yet served Olson. The Accused also moved to have the case designated as complex litigation. (Ex. 1

pages 951-2 and 1793-5 or Ex. 27) At oral argument on these motions, Berman offered to withdraw the pending Rule 21 motions if the fact that they had not been resolved would delay the trial. During this argument, Berman learned that the Accused had filed the motions to compel production referred to above without first conferring with him or Dunbar. Judge Ellis warned the Accused that because he had not conferred with Berman or Dunbar, his motions to compel production were not properly before the court and denied the Accused's motions for a set-over and for complex case designation. (Ex. 1 pages 951-3 and 1064-5)

After their June 9 appearance before Judge Ellis, Dunbar and Berman repeatedly offered to confer with the Accused about his discovery requests and invited him to come to their office to do so. The Accused declined the offer, but promised to call Berman within the hour to confer. The Accused did not keep his promise, nor did he ever confer with Berman about discovery, despite offers by Berman to do so on June 9, 10, and 16, 1999. (Ex. 1 pages 951-5 or Exs. 98-100) Berman voluntarily produced some of the documents the Accused requested on June 16, 1999, less than two weeks before trial. (Ex. 1 page 954 or Ex. 100)

In their conversation with the Accused after the June 9 argument, Berman and Dunbar also made their sixth settlement overture. This overture was confirmed by a letter dated June 25, 1999. (Ex. 1 page 1475 or Ex. 102) After pointing out that Judge Johnson had ruled that the Nutts' case against Gensman was now down to a $200 UTPA claim, Berman and Dunbar offered to settle for the sum of $1,000 to be paid to the Nutts, plus a waiver of Gensman's right to collect his fees from the Nutts. As of June 26, 1999, Ball Janik's fees were approximately

$29,065, making this offer worth approximately $30,065. (Ex. 1 page 1499 or Ex. 45) The Accused did not send the Nutts a copy of the June 25 letter and did not respond to it.

At oral argument on the summary judgment motions, which also took place on June 9, 1999, Judge Johnson ruled that the Nutts had no UTPA or fraud claims against Septem and Boresek. (Ex. 50 pages 121, 123) She signed an order to this effect. (Ex. 1 pages 1362-3) Judge Johnson also allowed Patton to amend Septem and Boresek's Answer to include a claim for attorney fees under TILA and the Oregon Unlawful Trade Practices Act. (Ex. 1 page 461, Ex. 50 page 144) At the time Judge Johnson dismissed the Nutts' UTPA claim against Septem and Boresek, these parties became *entitled* to recover some or all of their attorney fees from the Nutts. The accused did not advise the Nutts that Judge Johnson's rulings on Septem's summary judgment motions made it *certain* that they now would have to pay some or all of Septem's attorney fees as well as some or all of Gensman's attorney fees.

As he promised Judge Ellis on June 9, 1999, Berman withdrew his Rule 21 motions against the First Amended Complaint on June 14. (Ex. 32) Because the Accused had *never* alleged what damages Gensman had caused the Nutts – despite direction to do so from three different judges – on June 15, 1999, Berman did file another abbreviated rule 21 motion directed primarily at this deficiency. (Ex. 1 pages 1071-6 or Ex. 34) Without a proper allegation of what harm Gensman had caused the Nutts, the case was not ready for trial.

On June 15, 1999, Berman also filed an answer and counterclaim on behalf of Gensman. This pleading alleged

prevailing party attorney fees under the Oregon Lender Law and UTPA. (Ex. 1 pages 1133-41 or Ex. 33)

On June 16, 1999, Judge Johnson announced her decision on the remaining summary judgment issues. She decided that the Nutts did not have a right to a notice of their right to rescind their transaction under the Oregon Lender Law. (Ex. 51 page 154, 156) This resolved the Nutts' Oregon Lender Law claim in favor of Gensman as well as Septem. As of June 16, 1999, then, all claims against Septem had been resolved against the Nutts on summary judgment and had been dismissed with prejudice. The only claim against Gensman that remained was a $200 UTPA claim. Judge Johnson signed a partial final judgment in favor of Septem on June 16, 1999. (Ex. 1 pages 1221-2) Without consulting the Nutts about how they wanted to proceed, the Accused filed an appeal from this judgment on August 17, 1999. (Ex. 1 pages 1218-9) Berman submitted a proposed form of summary judgment order to Judge Johnson on June 16, 1999, but she did not sign it until June 29, 1999, two days before trial. (Ex. 1 pages 1025-29 or Ex. 35)

On June 23, 1999, not ready for trial, the Accused asked Berman and Patton to agree to abate the trial because of Jerry Nutt's health. (Ex. 1 page 2241 or Ex. 101) The Nutts had not asked the Accused to postpone the trial date. Despite the fact that Jerry Nutt's health was poor at that time, he was able and willing to go to trial. By this time, the stress of litigation had become too much for the Nutts, and all they wanted was to have it end.

Instead of preparing for trial, the Accused undertook to advise Judge Johnson of all the issues he felt she had

not resolved on summary judgment. This he did by letter dated June 28, 1999. (Ex. 1 page 1806)

Berman and Patton did not consent to abatement. Consequently on June 29, 1999 – two days before trial – the Accused filed a motion in presiding court to abate the litigation because of Jerry Nutt's health, something he knew about back in early June when he made his first request that Judge Ellis postpone the trial date. (Ex. 1 pages 2242-43 or Ex. 36) Judge Ellis denied this motion at a hearing held on June 30, 1999, and told the Accused that it was clear to him that the Accused had known about Jerry Nutt's medical condition when he had approached the court for a set-over on June 9. (Ex. 52 page 7) Judge Ellis assigned the Nutt case to Judge Douglas Beckman for jury trial the next day.

On June 30, Dunbar and Berman submitted to Judge Beckman their trial memorandum, proposed jury instructions, proposed verdict form and motions to exclude any evidence that related to any claims that had been dismissed on summary judgment and all evidence not related to the remaining UTPA claim. (Ex. 1 pages 989-1046) The Accused submitted a trial memorandum and requested jury instructions. (Ex. 1 pages 1318-1326 and 1337-1338) In addition, on June 30, the Accused filed a motion to abate the case because of Jerry Nutt's medical condition; a motion to postpone the trial, which claimed that the trial would take 5-7 days; a motion for leave to *once again* amend the complaint; a belated motion for an award of punitive damages on claims that had been dismissed by Judge Johnson; a motion to reconsider Judge Johnson's June 29, 1999 order granting summary judgment in favor of Gensman; and a Second Amended Complaint that again alleged all the claims against Gensman, BRG, Septem and

Boresek that Judge Johnson had dismissed and that *once again* failed to plead how the Nutts had been damaged by the conduct of these defendants. (Ex. 1 pages 1286-7; 1272-3; 1266-7; 1269; and 1303-17 or Exs. 38-43)

The Nutts appeared in Court on July 1, 1999, with their witnesses, thinking they were about to have their case tried to a jury. They had no idea that they had *no* claims left against their lender and only a $200 claim against their mortgage broker. Before they entered the courtroom, the Accused assured them that they would win easily. Phyllis again told the Accused that before she walked into the courthouse she needed reassurance that there would be no attorney fees assessed against her and her husband. The Accused told Phyllis not to worry, that they would not have to pay.

Instead of a jury trial, Judge Beckman began the hearing by asking Jerry Nutt how he felt and then denying the Accused's motions to postpone and abate. The judge then addressed the Rule 21 motions. He explained to the Accused why his Complaint, First Amended Complaint, and Second Amended Complaint did not allege damages. He gave the Accused the opportunity to articulate his theory of damages. When the Accused could not articulate damages, the Judge granted the Rule 21 motions and dismissed the claims against Gensman and BRG. Judge Beckman then declined to reconsider any of Judge Johnson's summary judgment rulings and ordered that the $10,000 escrow holdback – which was all that the Nutts had wanted to begin with – be returned to the Nutts. With that, the Nutts' "jury trial" was over. (Ex. 53)

In Judge Beckman's courtroom the Nutts finally understood that the Accused had not produced enough

evidence to support the claims in their pleadings. In about 20 minutes after they entered Judge Beckman's courtroom, the Nutts were on the courthouse steps, stunned to have learned that instead of a trial, they had lost the case before they entered the courtroom and would be ordered to pay the defendants' attorney fees. They left the courthouse with the impression that Judge Beckman did not wish to give them the time to consider their claims. The Accused told them there was nothing he could do to help them and, without explanation of what had happened to their case, walked away.

On July 16, 1999, Judge Johnson signed a partial final judgment against the Nutts and in favor of Septem and Boresek. (Ex. 1 pages 1225-6) This judgment entitled Patton to petition the court for an award of prevailing party fees and attorney fees against the Nutts. On July 20, 1999, Dunbar submitted a proposed judgment. The Accused filed objections to this form of judgment, claiming that Judge Johnson had not decided all the issues in the case on summary judgment and that the court should reconsider all its rulings, give him leave to file a Second Amended Complaint, and return the case to Judge Johnson for further consideration of summary judgment. (Ex. 1 pages 2248-52)

Judge Beckman set a hearing for entry of a final judgment in favor of Gensman for August 23, 1999. At that hearing, the Accused refused to stand when he addressed Judge Beckman and cross-examined and accused the judge of misconduct or legal error for about 20 minutes. (Ex. 1 pages 1907-16 or Ex. 54) Judge Beckman will testify that in 11 years on the bench, he can remember only one other case in which a lawyer had treated him as disrespectfully as the Accused did on August 23, 1999.

At the conclusion of the August 23 hearing, Judge Beckman signed an order that denied all the motions the Accused had filed the day before trial, dismissed all the claims alleged in the Accused's First Amended Complaint with prejudice, and – at long last – released to the Nutts the $10,000 escrow holdback that they had originally sought to pay for the completion of their home. (Ex. 1 pages 1179-80) Judge Beckman also signed a partial final judgment against the Nutts and in favor of Gensman and BRG that awarded Gensman and BRG their attorney fees and costs. (Ex. 1 pages 1176-8)

The next step was to determine how much the Nutts owed in attorney fees and costs. On July 28, 1999, Patton had submitted his statement for attorney fees and costs in which he claimed $10,707. Patton also asked for an enhanced prevailing party fee of up to $5,000 because of the Accused's misconduct in the case. (Ex. 1 pages 2193-2222 or Ex. 43) On September 7, 1999, Dunbar filed his statement for attorney fees and costs in which he claimed $42,292.55. Like Patton, Dunbar asked for an enhanced prevailing party fee of up to $5,000 because of the Accused's misconduct in the case. (Ex. 1 pages 1440-1545 or Ex. 44)

On September 2, 1999, the Accused filed a motion for a new trial. (Ex. 1 pages 1546-67) In that motion, the Accused claimed that Judge Ellis had abused his discretion when he refused to postpone the July 1 trial date; that Judge Beckman had abused his discretion when he insisted that the case be resolved on July 1, when he declined to reexamine Judge Johnson's summary judgment rulings, and when he refused to allow the Accused to amend the complaint; that Dunbar and Berman had engaged in judge

shopping; that Berman had made misrepresentations to the court; that there were irregularities in various court orders in the case; and that the court had misfiled some of the documents in the case.

Judge Beckman denied the Accused's motion for a new trial on September 20, 1999 and notified the parties that the hearing on the defendants' attorney fee petitions would be set for October 13, 1999. (Ex. 1 page 1951) The Accused had filed an objection to Patton's fee petition, but never filed an objection to Berman and Dunbar's. (Ex. 1 pages 1436-7)

After communications between the various lawyers and Judge Beckman's office, the hearing on attorney fees was reset to November 4, 1999, in part to accommodate the Accused's vacation, which the Accused had represented to the court and opposing counsel was to begin on November 6, 1999. (Ex. 1 page 345 or Exs. 106-110) During the course of the communications about scheduling, the Accused advised Judge Beckman that he would be filing a complaint with the Commission on Judicial Fitness regarding the judge's conduct in the Nutt case. (Ex. 1 pages 349-51 or Ex. 109)

Ostensibly to prepare objections to the defendants' attorney fee petitions, the Accused subpoenaed Ball Janik's and Herschner Hunter's time and billing records, even though he had already received these documents as attachments to their fee petitions. (Ex. 1 pages 1965-6; and 1998-9) When Dunbar and Patton refused to again provide copies of these documents, the Accused threatened them with a contempt proceeding. (Ex. 1 pages 1990; 1993; and 1995 or Exs. 104-6)

After July 1, 1999, the Nutts were extremely upset with the Accused and met with him only once. The Accused gave them to understand that there were some post-trial matters to take care of, but that they were not required to attend these proceedings. Although the Nutts had seen the attorney fees petitions, the Accused did not tell them the date of the hearing on the petitions or that the judge might be persuaded to reduce the amount of fees the defendants were requesting. The Accused never showed up for the attorney fee hearing to take whatever steps he could to reduce the Nutts' liability to Gensman and Septem, and he did not tell the Nutts he was not planning to attend. On November 4, 1999, Judge Beckman awarded the defendants the full amount of their fees plus $10,000 in enhanced prevailing party fees, for a total of $61,561.63. (Ex. 1 pages 1616; and 2259 or Ex. 55)

The case was over, but the Accused did not stop.[7] On September 23, 1999, without the Nutts' consent, the Accused filed a notice of appeal. (Ex. 1 page 1428) On November 3, 1999, again without consulting the Nutts, and contrary to their wishes not to proceed further, the Accused filed a motion to stay the circuit court proceedings pending the filing of a petition for a writ of mandamus in the Supreme Court and a motion to change the venue of the circuit court proceedings. (Ex. 1 pages 1711-19; 1692-1710; 2000-3; and 2006-8) The grounds the accused stated for the mandamus proceeding and motion for change of venue were various alleged acts of misconduct by Judge Ellis, Judge Beckman and Steve Berman and that the judges were prejudiced against the Nutts. The Supreme

[7] By this time, the Nutts had paid the Accused a total of approximately $7,200 in fees and costs.

Court denied the Accused's mandamus petition and the motion for reconsideration of their denial he then filed. (Ex. 1 pages 1684-91) Not satisfied with the Supreme Court's consideration of his various petitions, the Accused demanded that the State Court Administrator inform him of the names of the justices who had participated in considering his petitions and later demanded that the Chief Justice inform him which justices had participated in the decision to deny his mandamus petition and which justices had read all his submissions and exhibits in their entirety. (Exs. 115 and 116)

On December 3, 1999, Judge Beckman signed the final judgment awarding attorney fees and an order denying the Accused's motion for change of venue and to stay the circuit court proceedings. (Ex. 1 pages 1616-17; and 2256-7) On December 7, the Accused filed a motion to disqualify Judge Beckman and a motion to stay enforcement of the judgment Judge Beckman had signed December 3. (Ex. 1 pages 2186-92)

The first time the Nutts heard from the Accused after their "trial" was a December 10, 1999 letter in which the Accused advised them that they needed to post a bond for their appeal in order to "maintain our settlement leverage." (Ex. 114) The Nutts responded that they did not want anything to do with an appeal.

On December 13, 1999, Patton began his efforts to collect Septem's judgment against the Nutts. (Ex. 1 page 2124) Four days later, Dunbar began his collection efforts. (Ex. 1 page 2117) On December 28, 1999, the Accused, having persuaded the Nutts that they had to proceed with the appeal in order to avoid or postpone having to pay the judgments against them, filed a cost bond on appeal and

an undertaking signed by the Nutts that they would pay the judgments against them if they did not prevail on appeal. (Ex. 1 pages 2136-41) These documents were clearly insufficient under the statutes regulating appeals, and Patton and Dunbar objected to them. (Ex. 1 pages 2086-2091) On January 25, 2000, Judge Beckman heard argument on the sufficiency of the appeal bond and supercedes undertaking, and ruled that the Accused's submissions were null and void and insufficient to prevent Patton and Dunbar from executing on their clients' judgments. (Ex. 1 pages 2356-8)[8]

On January 25, 2000, pursuant to Judge Beckman's ruling, Patton garnished the Nutts' bank accounts. Dunbar garnished the accounts on January 28, 2000. (Ex. 1 pages 2313; 2316; 2364; and 2335)[9] As a result, the Nutts discovered one day that they had no money. They could not afford to pay the judgments against them and needed access to their bank accounts. Much to their humiliation, the Nutts now had to consider a suggestion the Accused had made shortly after "trial" that they file bankruptcy.

Not knowing who to turn to, the Nutts asked the Accused for a referral to a bankruptcy lawyer. The Accused suggested Cary Gluesenkamp, and the Nutts made an appointment. On February 25, 2000, Gluesenkamp filed a petition for bankruptcy on behalf of the Nutts and notified Ball Janik that his clients had done so. (Ex. 1

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[8] On January 24, 2000, the Accused had filed a motion to disqualify Judge Ellis. (Ex. 1 page 2067)

[9] Dunbar mistakenly garnished one of the Nutts' retirement accounts. When informed of this mistake, he immediately withdrew the garnishment. Even so, the Accused later filed a motion for sanctions against Gensman, BRG, Septem and Boresek. (Ex. 1 page 2308)

pages 2279-80 or Exs. 117 and 118). The Accused was not the Nutts' bankruptcy lawyer, and by the time they retained Gluesenkamp, the Nutts wanted to have nothing to do with the Accused.

The pending appeal of the Nutts' case against Gensman, *et al* was an asset of the bankruptcy estate. In April, 2000, the Nutts' bankruptcy trustee, Kenneth Eiler, asked Berman if he would be interested in settling the appeal. Because the Accused was attorney of record on the appeal, Eiler contacted him, advised him of his interest in settling the appeal and also advised him that the bankruptcy estate did not have the funds to pursue the appeal. (Ex. 119) The Accused responded to Eiler that he would pursue the appeal on a contingent fee basis even though the Nutts had made it very clear they did not wish to proceed with the appeal. (Ex. 120) At their first meeting of creditors, the Nutts testified to Eiler that they did not wish to pursue the appeal and Berman had offered payment of $2,000 to settle the appeal. Accordingly, Eiler decided to accept Berman's offer, notified the Accused that he intended to do so, and suggested that the Accused review the matter with the Nutts and Gluesenkamp. (Exs. 121-124)

The Accused did not review the matter with the Nutts and Gluesenkamp. Instead, on June 26, 2000, without the Nutts' knowledge or authority, he filed an objection to Berman's settlement proposal. In that objection, the Accused represented himself to be the attorney for the debtors (the Nutts). (Ex. 123) The Nutts had terminated the Accused's employment months earlier.

When Gluesenkamp learned from Dunbar of the Accused's objection, he tried to speak to the Accused about

it. (Ex. 126) The Accused did not respond to his calls. Accordingly, on July 20, 2000, Gluesenkamp wrote the Accused, informed him that the Nutts did not want to object to the proposed settlement, stated that the objection had been filed without the Nutts' knowledge or consent, and urged the Accused to promptly withdraw his objection promptly. (Ex. 127)

The Accused did not comply with Gluesenkamp's urgings, but asked for a telephone meeting with the Nutts and Gluesenkamp. After this telephone meeting, the Nutts wrote the Accused, informed him that they did not wish to continue the objection to the settlement and requested that he take steps to remove them from any further involvement related to the underlying litigation. (Exs. 131 and 132) The Accused finally withdrew his objection to the settlement with the bankruptcy trustee on August 30, 2000, but he did not comply with the Nutts' request that they be removed from any involvement with the underlying litigation. (Ex. 133) Instead, he informed Gluesenkamp that he would withdraw from the litigation "at the appropriate point." (Ex. 134) As of December 21, 2000, the Accused had not withdrawn, and the court file does not contain a notice of withdrawal.

The Nutts were clearly victims of the Accused's misuse of the legal system. However, they were not his only victims. When the Nutts bankrupted Gensman's and Septem's attorney fees judgments, the burden of paying the defense lawyers fell onto Gensman, whose only offense in the Nutt transaction was that he had an assertive method of communication that the Nutts may have found uncomfortable. Gensman had already paid Ball Janik over

$10,000 to defend him against a meritless law suit he could not get out of despite numerous attempts at settlement.[10] The pendency of the Nutt litigation had had an adverse effect on Gensman's mortgage brokerage business, as had a downturn in the economy. He could not afford one more debt, and when the attorney fees became his obligation, Gensman was also forced to file for bankruptcy.

Yet another victim of the Accused's misconduct was the Ball Janik firm. Gensman's bankruptcy left most of the firm's fee unpaid. The damage caused by the Accused's abuse of the legal system did not stop with the parties to the lawsuit and defense counsel. The Accused also caused harm to the court system and the judges who heard the Nutt case. He had tied up the trial and appellate courts for two years with meritless and repetitious matters, treated the judges and justices of the Supreme Court disrespectfully, and then filed meritless ethical complaints against the judges who had heard his case.

ARGUMENT

DR. 1-102(A)(4)

1. *The disciplinary rule.* The Bar has alleged that the Accused, with the conduct described above, violated DR 1-102(A)(4). That rule provides that:

> "It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice."

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[10] Gensman also was responsible for Patton's fees under an indemnity agreement with Septem and Boresek.

The scope of the rule has been established by the Oregon Supreme Court as follows:

> "To establish a violation of DR 1-102(A)(4), the Bar must show that (1) the accused lawyer's action or inaction was improper; (2) the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding; and (3) the accused lawyer's conduct had or could have had a prejudicial effect upon the administration of justice. *In re Haws*, 310 Or 741, 746-48, 801 P2d 818 (1990). The administration of justice includes both the procedural functioning of the proceeding and the substantive interests of parties to the proceeding. *Id.* at 747, 801 P2d 818. Prejudice may arise from several acts that cause some harm or a single act that causes substantial harm to the administration of justice. *Id.* at 748, 801 P2d 818." *In re Kluge*, 335 Or 326, 345, 66 P3d 492 (2003).

DR 1-102(A)(4) has no intent requirement. The focus of the rule is on the effect of a lawyer's conduct on the administration of justice, rather than on the lawyer's state of mind when the conduct is undertaken. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996). To establish a violation of DR 1-102(A)(4), then, the Bar need not show that an accused lawyer acted with the intent to prejudice the administration of justice, but merely that the lawyer's conduct had an actual or potentially prejudicial effect on the administration of justice. Actual harm from a lawyer's conduct need not be shown. A showing of the *potential* for harm from the lawyer's conduct is sufficient to establish a violation. *In re Thompson*, 325 Or 476, 940 P2d 512 (1997).

2. *The "conduct" in this case.* To establish the first element of DR 1-102(A)(4), it must be shown that the Accused engaged in "conduct" that was improper. *Kluge, supra.* For the purposes of this rule, improper "conduct" means doing something a lawyer should not do or failing to do something the lawyer should do. *In re Gustafson*, 327 Or 636, 643, 968 P2d 367 (1998). Stated another way, the question is whether the lawyer acted contrary to a duty, or failed to act in accordance with a duty, that applied to him or her under the circumstances. *Compare, In re Gustafson*, 327 or 636, 968 P2d 367 (1998) (deputy district attorney had duty to refrain from threatening a crime defense lawyer without lawful justification); with *In re Leuenberger*, 337 Or 183, ___ P3d ___ (2004) (no violation because bar failed to establish that there was a duty to refrain from filing certain *ex parte* motions utilized by the accused.)

In this case, the Accused repeatedly engaged in conduct contrary to duties that applied to him, even when those duties were imposed by court rule or case law. For example:

(A) ORCP 17(C)(4) provided that when a lawyer signs a pleading or other paper submitted to the court, he or she certifies that the allegations and other factual assertions in the pleading or other paper are supported by evidence. By signing the Complaint in the Nutts' law suit, the Accused certified that there was evidence to support his clients' damage claims which ranged from $100,000 to $500,000. The Accused asserted claims for damages that far exceeded any reasonable calculation of the damages his clients had incurred. Neither the Accused nor the Nutts were ever able to articulate any theory of damages that even came close to $100,000 and never had any evidence to

support the amount of damages they had requested in their pleadings;

(B) ORCP 21E and case law prohibited a lawyer from filing sham pleadings, i.e., pleadings that are false in fact. *Andrysek v. Andrysek*, 280 Or 61, 569 P2d 615 (1977). The Accused's claims of damages in the complaints he filed on behalf of the Nutts were false in fact, something that all three judges who ruled on the case recognized;

(C) ORCP 21E and case law also prohibited the filing of frivolous pleadings. *Andrysek v. Andrysek, supra*. The Accused did not make substantive changes to his allegations of damages in the First and Second Amended Complaints as he was ordered to do by Judge Bearden's rulings on the motions to strike the Complaint. The subsequent pleadings were, thus, frivolous and again subject to motions to strike or dismiss. *Goose Hollow v. City of Portland*, 58 Or App 722, 726 n 4, ;650 P2d 135 (1982);

(D) ORS 18.535(1) prohibited a pleading in a civil action from containing a request for an award for punitive damages unless the party seeking punitive damages filed a motion, supported by affidavits and documentation supporting punitive damages, to amend the party's pleading to include a request for punitive damages. The Accused drafted, signed and filed a complaint that included a request for punitive damages contrary to the provisions of ORS 18.535;

(E) Multnomah County Local Rule 6.012(1) imposed on the parties to civil litigation the obligation to make reasonable efforts to achieve settlement. Even though Gensman's lawyers made numerous attempts to discuss settlement, their efforts were rebuffed by the Accused to the substantial detriment of his clients. The Accused's only

participation in settlement discussions was one "take it or leave it" offer set so high that Gensman was sure to reject it and curt rejections of any settlement offers before his clients knew about them or what they were really worth;

(F) UTCR 3.050(3) required the Accused to stand while addressing the court. The Accused violated this rule in at least one appearance before Judge Beckman, when he refused to stand while addressing the court;

(G) When Judge Bearden granted Berman's motions to strike portions of the Accused's Complaint, ORCP 15B(2) imposed upon the Accused a duty to file an amended complaint within 10 days after service of the order. The Accused did not comply with this duty, subjecting the Nutts to a motion to dismiss. *Marguerite E. Wright Trust v. Dept. of Rev.*, 297 Or 533, 538, 685 P2d 418 (1984);

(H) ORCP 39D permitted a lawyer to instruct a deponent not to answer a question propounded in a deposition under *only* three circumstances, one of which is to preserve a privilege. The Accused violated his duty not to interfere with Gensman's efforts to obtain reasonable discovery when he instructed the Nutts not to answer questions about their medical conditions, even though the Accused had already put those conditions (thus waiving any claim of privilege) at issue before the court. It is particularly noteworthy that the Accused limited questions in an area that, if explored, would have revealed misrepresentations about Jerry Nutt's health and inability to comply with Berman's First Request for Production of Documents;

(I) UTCR 5.010 imposed upon the Accused a duty to confer before filing his motions to compel production against Septem and Gensman. The Accused did not confer

on these, his own motions, and refused to confer on many defense motions;

(J) ORCP43B required a party upon whom a request for production of documents is served to comply with the request, or file written objections to it, within the time specified by the request or face sanctions under ORCP 46. Berman's First Request for Production required the Accused to produce documents on October 4, 1998 (30 days after service of the request). The Accused did not meet this deadline, and Berman was required to file a motion to compel production. The Accused also did not meet the December 3, 1998 deadline specified by Dunbar's Second Request for Production of Documents and ultimately did not respond to this request.

Oregon disciplinary case law provides further guidance on what types of actions or omissions amount to "conduct" that implicates DR 1-102(A)(4). A violation of the disciplinary rule was found in following cases:

In *In re Rochat*, 295 Or 533, 668 P2d 376 (1983), the lawyer harassed and was disrespectful to court staff. In *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), the lawyer personally confronted an appellate judge over an adverse ruling, causing the judge to feel threatened. In this case, the Accused was disrespectful to Judge Beckman at the August 23, 1999 hearing on entry of judgment when he refused to stand while addressing the court and berated the judge for his handling of the case, causing the judge to feel threatened. He threatened to and did file meritless complaints to the Commission on Judicial Fitness against Judge Beckman and Judge Ellis. (Ex. 139) The Accused also acted disrespectfully to the Justices of the Supreme Court after the court denied his mandamus petitions by

demanding to know if the justices had read what he had submitted before rendering their decision.

In re Paauwe, 294 Or 171, 654 P2d 1117 (1982), the lawyer filed a meritless appeal without the consent of his clients. Here, the Accused appealed the Nutts' case without their knowledge or having first obtained their consent to do so. He then continued to pursue the appeal despite the Nutts' explicit instructions that he not do so and their reiterations that they wished to have nothing further to do with the litigation. The Accused also filed an objection to the bankruptcy trustee's proposed settlement with Dunbar without his clients' knowledge or consent and failed to withdraw it until long after the clients or their bankruptcy counsel had demanded he do so and after Dunbar had to file a response to his objections.

In *In re Worth*, 336 Or 256, 82 P3d 605 (2004), the lawyer failed to properly attend to or pursue his clients' legal matters, resulting in multiple dismissals and subsequent reinstatements of cases. This conduct was found to violate DR 1-102(A)(4), both because it was potentially prejudicial to the clients' substantive interests, and because of the harm to the procedural functioning of the judicial system. *See, also, In re Crist*, 327 Or 609, 965 P2d 1023 (1998) and *In re Gresham*, 318 Or 162, 864 P2d 360 (1993) (conduct unnecessarily burdensome to the judicial system violated DR 1-102(A)(4)). Here, the Accused failed to heed his clients' wishes to obtain the modest outcome of recovering enough money to complete the installation of their home without excessive legal costs or fees and without having to pay the costs or fees incurred by others. While the Accused did not fail to attend to the Nutt litigation, he did – contrary to his clients' express wishes – do everything he could to keep a meritless case alive against

defendants who had caused the Nutts *no* damages, file an appeal his clients did not wish to pursue, and prolong their bankruptcy proceedings with unauthorized objections, subjecting his clients to a huge judgment and driving them into bankruptcy.

In *In re White*, 311 Or 573, 815 P2d 1257 (1991) and *In re Stauffer*, 327 Or 44, 956 P2d 967 (1998), each lawyer filed and pursued numerous, duplicative and frivolous claims against targeted defendants. Here, the Accused asserted in the complaint claims for damages that were not properly pled or supported by evidence. He continued to file virtually identical amended complaints, despite instruction from three judges about what he needed to do to correct them and despite an order striking his damage claims. He also raised claims on summary judgment that he has not pled. He then went to trial on a case in which he had not asserted damages and made no attempt to articulate damages the day of trial, even though the trial judge offered him the opportunity to do so and proceed with trial. The Accused objected to every form of order presented to the court by the defendants, even the orders resulting from the November 4, 1999 attorney fee hearing at which he had not appeared. He also filed motions to abate and postpone the trial three times on the same grounds.

In *In re Dixson*, 305 Or 83, 750 P2d 157 (1988), the lawyer failed to appear at a scheduled deposition. Here, the Accused failed – for no apparent reason – to appear at the November 4, 1999 hearing on attorney fees and enhanced prevailing party fees to protect his clients' interests, with the result that the court granted judgment in the full amount of the defendants' requests and awarded an additional $10,000 in penalties against the Nutts.

In *In re Kluge*, 335 Or 326, 66 P3d 492 (2003), the lawyer filed an untimely motion to disqualify a judge and without notice to opposing counsel. Here, the Accused also filed an untimely motion to disqualify Judge Beckman long after he had heard substantive matters in the Nutt litigation.[11]

3. *The harm or prejudice.* The prejudice that resulted from the Accused's conduct was substantial, as virtually everyone involved in this litigation was left harmed in the Accused's wake. The opposing parties incurred thousands of dollars in fees defending themselves against the Accused's claims. Gensman filed for bankruptcy protection and his lawyers went largely unpaid. The court system was burdened with the Accused's numerous filings and disrespectful behavior, to the point where enhanced prevailing party fees were assessed. Most significantly, the Nutts, who initially consulted the Accused with a modest request for assistance in the completion of their Hebo retirement home, were driven to bankruptcy by the fees and costs assessed against them because of their own lawyer's conduct. Financial loss aside, the stress and anxiety caused the Nutts by the Accused was immeasurable. In sum, the Accused engaged in a pattern of conduct that had the potential to cause, and in fact did cause, harm to the substantive interests of the Accused's clients and to the functioning of the judicial system.

[11] ORS 14.250(3) prohibits a lawyer from filing a motion to disqualify a judge after he or she has ruled upon anything other than a motion to extend time in the proceeding.

4. *Summary*. The Accused engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(4).

SANCTION

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions* ("*Standards*"), in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct.

A. ABA *Standards*.

The *Standards* established an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, the court makes a preliminary determination of sanctions, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances.

B. Duty Violated.

In this case, the Accused violated a duty owed to the legal system by abusing the legal process. *Standards* § 6.2.

C. Mental State.

The ABA *Standards* define the mental state of "intent" as the conscious objective or purpose to accomplish a particular result; and further define the mental state of "knowledge" as the conscious awareness of the nature and attendant circumstances of the conduct but without the

conscious objective or purpose to accomplish a particular result. *Standards* at 7.

In this case, the Accused acted with no less of a mental state than knowledge, and at times acted with intent. The Accused certainly had knowledge that the damage claims he asserted on behalf of the Nutts were not based on a factual foundation, and when this was pointed out to him by others, he intentionally continued to assert them. He was advised and therefore had knowledge that some of his pleadings were defective, and when he failed to remedy the defects he acted with intent. When the Accused continued to ignore court rules about conferring with opposing counsel after being instructed to do so, he acted intentionally. From the correspondence of the Accused to opposing lawyers, it is reasonable to infer that the Accused intended to obstruct the discovery and settlement negotiation process. It also is a reasonable inference from the evidence that the Accused intended the disrespect he exhibited toward trial and appellate judges who considered parts of the *Nutt v. Gensman* litigation. Clearly, the Accused knew of his clients' express wishes to avoid expensive litigation and exposure to costs and fees, yet he knowingly acted in a manner inconsistent with those wishes. It is also clear that the Accused intended to intercede in his clients' bankruptcy proceeding without the consent or authority of his clients, and that he persisted with his filed objection to the bankruptcy settlement despite the Nutts' instructions that he not do so.

D. Extent of Actual or Potential Injury.

For the purposes of a disciplinary sanction analysis, both actual and potential injury is taken into account. *In*

re Williams, 314 Or 530, 840 P2d 1280 (1992). In this case, there were both types of injury.

The evidence will show that the named defendants in *Nutt v. Gensman* incurred thousands of dollars in attorney fees defending claims that ultimately were dismissed. At least a portion of those fees (a total of $10,000 assessed as enhanced prevailing party fees) was attributable directly to the Accused's misconduct as alleged in this proceeding. The Nutts could not pay the fees and costs assessed against them and were forced to file bankruptcy. Gensman therefore could not recoup his fees from the Nutts and could not himself pay his lawyers; he, too, filed for bankruptcy. This actual injury was caused directly or indirectly by the Accused's misconduct.

The court system, too, incurred actual injury as it endured many filings by the Accused and numerous hearings to sort out the litigation disaster he created. Judge Beckman also endured the Accused's extremely disrespectful behavior and had his integrity impugned.

The Nutts suffered both actual and potential injury. They brought the Accused a relatively simply legal problem and had a modest request: they wanted assistance in the completion of their retirement home at a minimum amount of cost or aggravation. Instead, the Accused led them into a nightmare of legal proceedings that accomplished nothing and cost them dearly. Financial and emotional stresses were extreme. When they had little option but to file for bankruptcy, the Accused's objections to the trustee's proposed settlement with the Gensman defendants potentially put the Nutts' bankruptcy proceeding in jeopardy.

In summary, due to the manner in which the Accused conducted himself and this litigation, the end result was a "lose, lose" for everyone who touched it. Particularly for the Nutts, whose interests the Accused will assert he was trying to protect, the injury was extreme.

E. Preliminary Sanction.

Under the ABA *Standards*, a lawyer who knowingly abuses the legal process is subject to suspension. *Standards* § 6.22. A lawyer who does so intentionally is subject to disbarment. *Standards* § 6.21.

F. Aggravating and Mitigating Circumstances.

Factors that aggravate the sanction in this case include:

1. The Accused previously has been reprimanded. *See, In re Paulson*, 335 Or 436, 71 P3d 60 (2003). However, the prior discipline occurred after the events relevant to this second proceeding against the Accused, and therefore is not considered a prior disciplinary offense under the ABA *Standards* §9.22(a). *See, In re Jones*, 326 Or 195, 951 P2d 149 (1997). Nevertheless, the existence of the prior misconduct demonstrates that the Accused's ethical violations in this case are part of a larger pattern of misconduct, and this is an aggravating factor entitled to consideration under ABA *Standards* § 9.22(c). *In re Worth*, 337 Or 167, ___ P3d ___ (2004);

2. The evidence will show a pattern of misconduct. *Standards* § 9.22(c). See paragraph F. 1 above;

3. The Accused does not acknowledge any wrongful conduct. *Standards* § 9.22(g);

4. The Nutts were particularly vulnerable to injury inflicted by their own lawyer. *Standards* § 9.22(h);

5. The Accused has substantial experience in the practice of law, having been admitted in Oregon in 1973. *Standards* § 9.22(i).

Factors that may mitigate the sanction in this case include:

1. There was delay in the investigation of the complaint that led to this proceeding. *Standards* § 9.32(j).

G. Oregon Case Law.

There is no Oregon discipline case that exactly mirrors the Accused's conduct as alleged in this proceeding. However, several Oregon cases provide sufficient guidance for the panel to conclude that the Accused should be suspended from the practice of law.

In *In re White*, 311 Or 573, 815 P2d 1257 (1991), two chiropractors, who had been business partners, had a falling out. Thereafter, on behalf of one chiropractor, the accused lawyer engaged in a campaign of litigation against the other chiropractor that included filing repetitious claims; filing claims in different counties when that was not warranted; failing to change venue when venue was not proper; failing to appear at hearings without notice to the court or opposing counsel; and failing to prosecute cases. This conduct was found to be prejudicial to the administration of justice in violation of DR 1-102(A)(4), among other rules. The lawyer also committed other,

factually unrelated violations, but the court focused on his abuse of the legal system as the primary basis for imposing a three year suspension from the practice of law. The court noted particularly the lawyer's use of the legal system as a tool to harass, rather than to resolve his client's legitimate disputes. *Id.*, at 591.

Similarly, in *In re Stauffer*, 327 Or 44, 956 P2d 967 (1998), the lawyer relentlessly pursued a former client through various courts in order to collect an attorney fee that continued to grow as the lawyer plowed more time into the pursuit. The Supreme Court found the case to involve a "staggering amount of unnecessary litigation and the multi-year probate of an essentially no-asset estate, which should have been closed promptly. The accused used the probate and bankruptcy courts as mere tools in his efforts to pursue his attorney fees claims against [the former client]." *Id.*, at 61. This conduct violated DR 1-102(A)(4) and it, along with conflict of interest and excessive fee violations, led to the lawyer's two year suspension from the practice of law.

The lawyer in *In re Kluge*, 335 Or 326, 66 P3d 492 (2003), filed an untimely motion to disqualify a trial judge and failed to serve copies of the motion on opposing counsel and the judge against whom the motion was filed. The Supreme Court found that the accused's conduct prejudiced the procedural functioning of the judicial system by imposing a substantial burden upon both opposing counsel and the trial judge to undo the accused's actions. In part for this misconduct, and also because the lawyer was found to have acted dishonestly and had a prior disciplinary record, the lawyer was suspended for two years. *See, also, In re Gresham*, 318 Or. 162, 166, 864 P.2d 360 (1993) (lawyer's conduct that led to an unnecessary burden upon

the court was prejudicial to administration of justice and contributed to a 91 day suspension).

In *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995), the lawyer represented a criminal defendant. On the day of trial, the judge asked whether the parties were ready to proceed. The accused said that the defense was not ready and made several motions, seeking to postpone the trial and to withdraw the client's waiver of a jury trial. The judge denied the motions. The accused also asked the judge to recuse himself, which the judge declined to do. The accused believed that the judge would be unfair to the client if the trial went forward. The judge and the accused then engaged in the lengthy colloquy in which the lawyer threatened not to put on any defense so as to create reversible error with the ineffective assistance of counsel. Ultimately, the judge postponed the trial and appointed new counsel for the defendant.

In the discipline case against *Jeffery*, the Supreme Court found that the lawyer's conduct harmed the orderly process of the courts generally, citing with approval the trial judge's assertion that the ethical responsibility of a lawyer to accept the rulings of the court is like the glue that holds the legal system together. In addition, the court found harm specific to the criminal case because a continuanced was required, new counsel had to be appointed, and time and resources were wasted. Although there were conflict of interest violations present in addition to the violation of DR 1-102(A)(4), much of the nine month suspension imposed by the Supreme Court appeared to stem from the DR 1-102(A)(4) charge.

Even single, isolated acts that violate DR 1-102(A)(4), as opposed to the Accused's lengthy course of misconduct,

have resulted in terms of suspension from practice. In *In re Meyer*, 328 Or 211, 970 P2d 652 (1999), the lawyer caused a DMV hearing to be reset because he appeared at the hearing on behalf of a client in an intoxicated state. Meyer was suspended for 91 days. In *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), the lawyer, upset over an adverse ruling from the Court of Appeals, confronted an appellate judge in the courthouse hallway and was verbally abusive to her. Thompson was suspended for 63 days.

In *In re Smith*, 316 Or 55, 848 P2d 612 (1993), the lawyer wrote a letter to a doctor who was going to conduct a medical evaluation of the lawyer's client. The letter threatened the doctor, who was a potential witness in a workers compensation proceeding involving the client, with litigation if the evaluation was not favorable to the client's position. Smith was suspended for 35 days. A 35 day suspension also was imposed in *In re Rochat*, 295 Or 533, 668 P2d 376 (1983), when the lawyer was disrespectful to and harassed court staff because he was unhappy with the number of court appointed cases he was receiving from the court. In *In re Paauwe*, 294 Or 171, 654 P2d 1117 (1982), the lawyer was suspended from practice for 30 days after filing a notice of appeal that had no merit and without the consent of his clients.

The Accused's misconduct in this proceeding was not an isolated act or momentary lapse of judgment like the lawyers in *Meyer, Thompson* or *Smith*. Rather, the Accused engaged in an extended pattern of reckless, obstructive and offensive acts that were prejudicial to the administration of justice. More than a short term suspension is called for in this case.

On the other hand, the Accused's misconduct probably is not as extreme as the conduct described in *In re White, supra*, (three year suspension) or *In re Stauffer, supra*, (two year suspension), although the injury sustained by the Nutts, the opposing parties and the court was substantial in this case.

After considering the ABA *Standards*, including due account for aggravating and mitigating factors, and Oregon case law, the bar respectfully suggests that the appropriate outcome in this case is that the Accused should be suspended from the practice of law for one year.

H. Summary.

The bar does not dispute that trial lawyers need and should be given some latitude in the way they handle their litigation. Strategic decisions by litigators should not be second-guessed, absent unusual or extraordinary circumstances. This case presents just such circumstances. For whatever reasons, the Accused took a relatively routine civil dispute and turned it into a litigation disaster for his clients, the opposing parties and the court. His conduct crossed the line between zealous advocacy, on the one hand, and out-of-bounds excesses, on the other.

The Accused engaged in conduct prejudicial to the administration of justice contrary to DR 1-102(A)(4), and should be suspended from the practice of law for a period of one year.

Respectfully submitted this 7th day of September, 2004.

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks, OSB 75167
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing OREGON STATE BAR'S TRIAL MEMORANDUM on the 7th day of September, 2004, by delivering the original to:

Disciplinary Board Clerk
Oregon State Bar
5200 SW Meadows Road
Lake Oswego, OR 97035

I further certify I served the foregoing OREGON STATE BAR'S TRIAL MEMORANDUM on the 7th day of September, 2004, by mailing a copy by first class mail, with postage prepaid, through the United States Postal Service to:

Michael C. Zusman, Esq.
Trial Panel Chairperson
Evans & Zusman PC
5331 SW Macadam Avenue #350
Portland, OR 97239

Arnold S. Polk, Esq.
5150 SW Griffith Dr
Beaverton, OR 97005

Loni J. Bramson
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Aloha, OR 97007

Gregory J. Miner, Esq.
Bar Counsel
Preston Gates & Ellis LLP
222 SW Columbia St #1400
Portland, OR 97201

Dated this 7th day of September, 2004..

OREGON STATE BAR

By: /s/ Martha M. Hicks
Martha M. Hicks, OSB 75167
Assistant Disciplinary Counsel

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Complaint as to the Conduct of LAUREN J. PAULSON Accused.	)))))))	Oregon State Bar Case No. 01-100 SC S52465 **ORDER DENYING PETITION FOR RECONSIDERATION**

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 15th day of August 2006.

/s/ Paul J. De Muniz
PAUL J. DE MUNIZ
CHIEF JUSTICE

Carson, J., not participating

c: Lauren J. Paulson
Martha M. Hicks
Mary Anne Cooper
Gregory J. Miner

IN THE SUPREME COURT
OF THE STATE OF OREGON

In re:	)	
	)	OSB Case No. 01-100
Complaint as to the Conduct of LAUREN PAULSON,	)	Supreme Court Case No. S52465
	)	
Petitioner on Review.	)	

PETITION FOR RECONSIDERATION OF LAUREN PAULSON

Petition for Reconsideration of the Opinion of the Supreme Court Dated June 8, 2006

Denied with Opinion
Chief Justice DeMuniz
Justice Gillette
Justice Durham
Justice Riggs
Justice Balmer
Justice Kistler

Lauren Paulson, OSB #73232
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Attorneys for Oregon State Bar June 28, 2006

PRELIMINARY

Helen Thomas, the stalwart White House reporter recently observed that she dreamed of a world where the weak were secure and the powerful were just. (C-Span, June 24, 2006)

STATEMENT OF THE CASE ON RECONSIDERATION

1. *DUE PROCESS AND EQUAL PROTECTION* – *The Supreme Court of the State of Oregon has denied it's* [sic] *Oregon State Bar (OSB) Member, Lauren Paulson, fundamental due process and equal protection of our laws by fully considering the putative (but erroneous) facts and arguments of the Oregon State Bar and considering the arguments* ***and evidence*** *of the Oregon State Bar Member, Lauren Paulson,* ***not at all****. In order for the OSB to establish the alleged Misconduct they must do so by "clear and convincing evidence" which means evidence establishing that the truth of the facts asserted is highly probable. Unfortunately, the Supreme Court Opinion of June 8, 2006 is riddled with factual errors and for that reason there has been no examination of the evidence to establish the truth of the facts at all, much less highly probable vel non.. If at least one Member of the Oregon Supreme Court does not read the record then they cannot determine accurate facts for a conviction. It is patent that no member of the Oregon Supreme Court has read the record in this case. Moreover,*

the Oregon Supreme Court does not even have a complete copy of the record. (***App 1***)

2. *REPRISAL AND FREE SPEECH – Oregon State Bar leadership is engaging in blatant and insidious reprisal against Lauren Paulson. Paulson is a sole practitioner, the former President of the Washington County Bar Association and present (suspended because of a 'new rule' – BOG Bylaw 18.6 based on this case) member of the Oregon State Bar Board of Governors (BOG) because he has spoken out against the policies of the Oregon State Bar, its leadership, and the judiciary. Thus they are violating Paulson's right to free speech and freedom of the press by bring* [sic] *spurious ethical complaints against him. Shocking is that this is happening while Paulson was speaking for the policy making organization (BOG) of the Oregon State Bar. (Paulson requests the Oregon Supreme Court to take Judicial Notice of Paulson v. Carter et al., USDC No. CV 04 962 HU, CA 6-35260 where both this case and these identical constitutional matters are at issue)*

3. *RECUSAL – Oregon Supreme Court Chief Justice Wallace Carson has already recused himself from this case because he secretly discussed this case with then-President of the Oregon State Bar, William Carter, (who engineered Paulson's suspension from BOG) while the matter was pending before the Oregon Supreme Court in violation of the Oregon Constitution Art 1, Section 10.* (***See, Reply Br. App-2***) *Lauren Paulson asked Justices Gillette and Balmer by letter dated January 11, 2006 to recuse themselves because of their obvious hostility toward him on the record at oral argument. Neither followed the required U. S. Supreme Court objective procedure to determine if they should be recused from this case, it is possible one of them wrote the June 8, 2006 opinion and otherwise participated*

in this Opinion when there is an objective question as to whether they are prejudiced against Paulson. ***(App 2)***

4. PROSECUTORIAL MISCONDUCT – It is now clear that the Oregon State Bar Disciplinary Process allows Jeff Sapiro, OSB's Disciplinary Counsel (of whom Lauren Paulson made a disciplinary complaint in this case for his exorbitant delay in his investigation) to engage in unfettered reprisal against members of the Oregon State Bar because he is the judge (he helps pick the disciplinary trial panel members), jury (he is the attorney for the SPRB – the disciplinary system's grand jury and hangman (all complaints against Disciplinary Counsel must be investigated only by the SPRB – the problem with this mandatory procedure is that SPRB's attorney is Jeff Sapiro, the Disciplinary Counsel. Thus, the investigations of Jeff Sapiro become stillborn because the client is investigating their own attorney. This is a denial of equal protection of the laws and a conflict of interest. The prosecutorial misconduct also extends to their three and half year delay in investigation of Mr. Gensman's complaint. This denies Paulson's constitutional right to a speedy trial. ***(App 3)***

5. DE NOVO REVIEW AND DOUBLE JEOPARDY – There is a significant question as to whether there was, in fact, a full de novo review of the entire record in this case as pointed out above. It is Paulson which appealed the decision of the Trial Panel which only found actions prejudicial to the administration of justice in the bankruptcy proceedings. By increasing the trial panel sanctions from 45 days to 180 days when the Bar did not appeal violates Paulson's constitutional right to be free from double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides that no person shall be subject for the

same offense to be twice put in jeopardy of life or limb. De novo review puts Paulson in the peril of being tried twice for the same offense of which he was acquitted by the Trial Panel. This is a potent instrument of oppression by the government particularly manifest here when the instruments of the OSB are so clearly determined to take away Paulson's profession.

PROCEDURAL POSTURE

(The Oregon Supreme Court may recall that Paulson presented two charts at oral argument one of which summarized and responded to the bar allegations in detail. The other chart responded to the completely false allegations that Paulson did not follow the orders of each judge involved in this case of which there are six at the trial court level. The Bar did not object to these chart Exhibits at oral argument which were also used at the Trial Panel proceedings. These charts were left with the Oregon Supreme Court as part of the record. These charts are duplicated here as App 4 and App 5)

1. The Underlying Lawsuit – A certified copy of the entire 10 volume Multnomah County Circuit Court file – Case No. 9804-03034 is the Bar's Exhibit 1 and was only furnished to the Trial Panel Chair, Mr. Zusman. Presumably, it is part of the record in the Oregon Supreme Court. It is not known if the missing Volume 3 is part of that certified copy, but Paulson has requested an opportunity to audit the record upon which the Supreme Court of Oregon rendered its June 8, 2006 Opinion. **(See App 1)**

As far as is known to Paulson, this is still an open file because the judgments filed by Ball Janik

did not meet the criteria for appealable judgments according to the Court of Appeals.

2. The Gensman Bar Complaints – **It is not mentioned in either the Bar's brief nor in the Supreme Court of Oregon's Opinion that it was Mr. Gensman, the Nutt's loan broker and adversary that made these Bar complaints against Paulson. Nor is it mentioned that Mr. Gensman's first complaint of February 4, 1998 was dismissed as without merit by Disciplinary Counsel Saroyan. (See App 4 and 6) Nor is it mentioned that the Bar also dismissed Mr. Gensman's second Bar complaint a Month later. Mr. Gensman made his third Bar complaint in March of 2000. Paulson made his Bar complaint against Mr. Sapiro in November of 2001 for exorbitant delay in the Bar's investigation. (App 7)** The Bar admits a three and half year delay in this investigation and the Opinion confirms that admission at page 28. **What the Opinion does not address is the fact that after Paulson made his Bar complaint against Mr. Sapiro in 2001 that Mr. Sapiro assigned the investigation to Wayne Appleman for a scorched earth investigation in reprisal. Mr. Appleman interviewed the judges, took the Nutt's deposition without telling Paulson and conducted an additional eight months of investigation into all aspects of Paulson's life including all litigation in Washington County where Paulson has his office. (Note that on January 13, 2004 Karen Garst, Executive Director of the Oregon State Bar asked Jeff Sapiro to put a "special investigator in Lauren's cases" (Reply Br. App 14)**

Finally, note that Wayne Appleman, the Bar's special investigator in this case has never been in

private practice, never been involved in litigation and never practiced law. (See Appleman deposition, part of the record in de novo review) (See App 4 for a complete chronology of the Bar complaint and Paulson point-by-point response to the Bar allegations)

LEGEND

1. **The Record** – Everything which follows in **bold** means that it is in the record, but was not mentioned by the Supreme Court Opinion of June 8, 2006.

2. **The Truth** – If something is **in bold and underlined** that means that both the Oregon State Bar and the Supreme Court of Oregon Opinion of June 8, 2006 are wrong about the facts in the record.

THE FACTS?

Phyllis and Jerry Nutt, from Aloha, consulted with Lauren Paulson, a sole practitioner from Aloha, to help them with respect to problems with the purchase and delivery of a modular (v. manufactured) home to property they owned in Hebo, Oregon. **The Washington Sales Manager for American Modular Homes, Bob Pollack, passed the Nutts off to newly hired Oregon representative Defendant Don Olson. (ER-38) Defendant Olson falsely represented himself to be a general contractor and falsely represented himself to be the owner of Far West Construction. (ER-39) Olson did this to obtain someone else's Construction Contractor's Board number. Defendant Olson put the Nutts in touch with Mark Gensman. President of Business**

Resources Group for a loan. Mr. Gensman was also new to his position having been licensed as a mortgage broker (ORS 59.840(6) only a week before the April, 1997 meeting with the Nutts. It is undisputed that Mr. Gensman did not supply the Nutts with documents required by the Federal Truth in Lending Act. (See E-57 to Paulson Reply Brief)

1. **"On October 20, 1997, the Nutts sought legal advice from the accused regarding the acquisition of permanent financing."** (Opinion, Page 2) That is false. **The Nutts sought Paulson's legal advice for their "home purchase." (Exhibit 62) Paulson never helped the Nutts with nor advised the Nutts regarding the acquisition of permanent financing.** There is nothing in the record to suggest Paulson participated in the Nutts loan financing in any event, These are simply made-up facts.

2. **"The accused reviewed the Nutts' loan documents and advise [sic] them to pursue a claim against Gensman and their construction lender."** (Opinion, Page 3) That is false and a nonsequitur. **Upon being retained in October of 1997, Paulson requested that Mr. Nutt put in writing the complaints that they had and the reason for their visit to him for legal help. Mr. Nutt's writing was only about American Modular, the dealer and Olson, the contractor. Mr. Nutt did that in a seven page outline dated November 20, 1997. (Exhibit 63)** There was no discussion at all about any claims against their mortgage broker, Mr. Gensman and indeed there is nothing in this seven page November 20, 1997 outline by Mr. Nutt about that subject. **Paulson traveled to Hebo on November 25, 1997 to meet with the dealer's representative**

and Mr. Olson, (who had referred the Nutts to Mr. Gensman for their construction loan) for a review of the status of the Nutt's construction project. Following that meeting Paulson sent Mr. Olson a November 28, 1997 letter summary of the meeting agreements and an outline of the Nutts claims and damages. (Exhibit 64)

Curiously, the Supreme Court Opinion ends its recitation in October of 1997 of the substantive facts before litigation and that recitation of the entire factual prelitigation background to this case is less than one page long. But Paulson didn't file suit on the Nutts behalf until over six months later, in April of 1998. A lot happened in that six months. The spin on the facts by the Bar and the Opinion make it appear that Paulson ran the Nutts headlong into unwanted litigation. That is false The considerations were carefully weighed as to each claim against each defendant and that consideration took much study and many months.

The first order of business was to get the construction loan holdback of $10,000 to the Nutts. (Exhibit 65-67) Because the construction loan agreement (Exhibit 3) did not contain the familiar four boxes required by the Truth in Lending law, Paulson sought a written opinion from a banking lawyer, Gary W. Lindberg which he provided on January 8, 1998. (ER-57) After detailed discussions with Mr. Lindberg and the Nutts, Paulson rendered a detailed analysis, in writing, outlining Paulson's evaluation of all claims against all parties. (Exhibit 68) Why would the Bar and the Supreme Court Opinion leave out this careful detailed analysis of the legal claims of the Nutts against all defendants written by Paulson?

3. The Supreme Court Opinion sets forth in the sentence immediately following the October 20, 1997 date another non sequitur – "The Nutts expressed a desire simply to finish their home and indicated their reluctance to get involved in extensive litigation" (Opinion, Page 3) This factual misstatement may have been taken from OSB's brief at Page six following a December 1997 chronological factual representation which stated:

> **"The Accused continued to advise the Nutts that Gensman and Septem had committed egregious violations of TILA and various Oregon laws. The Nutts repeatedly told the Accused that they did not want to sue; nevertheless, the Accused convinced them that their lender and mortgage broker had committed such serious violations that the Nutts had a civic duty to litigate. [Nutt testimony, p. 3, OSB Trial Memo]" (Ans. Br. P6)**

Here is how the factual wheels have fallen off. Note the Bar's brief refers the Court to "Nutt testimony, p.3, OSB Trial Memo." The Bar wrote their Trial Memo before there was testimony. Later, the parties stipulated to submit this matter on written submissions and depositions already taken. So, there never was any Nutt testimony. OSB's Trial Memo dated September 7, 2004 at Page 3 states:

> **"While the Accused was attempting to negotiate with Olson's lawyer, he was also advising the Nutts that Gensman and Septem had committed egregious violations of the federal Truth in Lending Act and various Oregon laws. The Nutts did not want to be parties to a lawsuit and told the Accused so**

> **on several occasions. Nevertheless the Accused convinced the Nutts that the violations of law he claimed had been committed by their lender and mortgage broker were so serious that they – as good citizens – should sue to make sure what had happened to them did not happen to anyone else." (Bar Trial Memo, Page 3)**

None of these purported facts is true in #3 and none will be found anywhere in the record. These representations by the Bar are just plain preposterous. The remainder of the Supreme Court Opinion's putative facts from Page 3 to Page 16 simply paraphrases the Bars Answering Brief from Page 6 to Page 29. Virtually each parallel paragraph of each document begins with the phrase: On (date) the (following happened). Unfortunately, all of these parallel representations by the Bar and the Court are not in the record or simply spin to make Paulson look bad. For example both documents state what happened on September 4, 1998 and both mention that Berman again asked Paulson for a settlement proposal. The implication is that Paulson is dilly-dallying and not serving his clients interest by offering up the Nutt's estimate of damages as well as a settlement proposal. Well, lets look at the facts, Paulson is on a contingency fee agreement. (Exhibit 69) Paulson has absolutely no incentive to dilly-dally nor put off settlement. Indeed, Paulson evaluated the case for settlement many, many times and was always open to explore settlement. Ball Janik's attorney Berman on the other hand makes more money if he creates pleading opportunities and creates litigation opportunities. He makes no money if he settles. Paulson made his first written settlement overture on behalf of the Nutts in **November 28, 1997.** (Exhibit 64)

4. **"The accused, however, had not asked the Nutts to compile any documents until after Berman had moved to compel"** Opinion Page 6 This is false. The Motion to Compel was filed October 15, 1998. Paulson asked the Nutts to compile all of their documents a year earlier in 1997. They furnished him with all of their construction documents, their loan documents and documentation of what they had been through by then. Paulson had also secured a complete copy of Mr. Gensman's file in 1997. Indeed, Paulson submitted thirty two pages of documents compiled from the Nutts and Gensman which was attached to the initial complaint filed in April, 1998. Exhibit 3.

5. The Supreme Court Opinion of June 8, 2006 from Page 4 to page 16 has twenty two (22) factual entries in quotation marks without reference to which exhibits in the record those quotations are made. Some of these quotations includes purported statements from judges. There are over two hundred exhibits in this case involving thousands of pages. There is simply no way to respond to these inaccurate purported statements without knowing to what exhibits in the record they refer.

6. "On September 2, 1999, the accused moved for a new trial. In that motion, the accused claimed that two of the judges had abused their discretion by denying his prior motions and that Gensman's lawyers had engaged in "judge shopping" and had made misrepresentations to the court. On September 20, 1999, the trial court denied the accused's motion and scheduled the attorney fees hearing for October 13, 1999." (Opinion Page 12) Judge Beckman denied the Nutt's Motion for a New Trial without reading it or having a hearing. **(See App 1 and See Exhibit 109)** His hand written note dated September 20, 1999 on Mr.

Dunbar's letter states: "Just deny. Don't need a hearing" **(App 8)** because Mr. Dunbar advised him he didn't want a hearing even though it is Paulson's Motion. This goes to the denial of equal protection of the laws. Paulson can't get a hearing on a Motion for a New Trial, but Ball Janik can get a hearing on their attorney fee matter when Paulson is unavailable. There is a well-worn mantra by the Oregon State Bar Disciplinary Counsel's office that they are not confined to specifically articulated ethical complaints, rather they explore any ethical issues they encounter during their investigation. Nowhere is that wide-ranging investigation more apparent than Mr. Appleman's 300 page investigation of Paulson here. In the quoted Court language cited above Paulson is alleging that Ball Janik's lawyers had engaged in "judge shopping" and had lied to the Court. There is no investigation anywhere by the Bar nor even by this Court which has the authority to do so under the Oregon Constitution Art. VII (Am), Section 8. and the Code of Professional Responsibility. Why are Paulson's ethical allegations against others ignored? It is because of the bias clearly felt by Oregon lawyers in a 2002 survey. **(App 9)**

7. **"... the accused took no steps to reduce the Nutts' liability for attorney fees...."** (Opinion page 12) Paulson subpoenaed Ball Janik's attorney fee billing records, but Ball Janik refused to comply with the subpoena. Moreover, Paulson wrote to Mr. Dunbar on November 6, 2006 and suggested that we use Jacob Tanzer as a mediator to try to settle the case. (Exhibit 111)

8 **"Additionally, although the trial court had changed the date of the attorney fee hearing to accommodate the accused, the accused failed to appear at the hearing"** (Opinion Page 13) *Again this is*

just plain false. The opposite occurred and it is carefully summarized in Exhibits 108 and 109.

9. **"On December 28, 1999 having persuaded the Nutts to proceed with an appeal. . . . "** (Opinion, Page 13)

"Without consulting with the Nutts (Nutt testimony p. 20, OSB Trial Memo) the Accused appealed from this judgment on August 17. 1999. (Ex1 pp. 1218-19) (OSB Ans. Br. Page 20)

IT IS SIMPLY BEYOND PAULSON'S ABILITY TO UNDERSTAND WHY THE OREGON STATE BAR AND THE OREGON SUPREME COURT WANT TO INTENTIONALLY MISLEAD THE READER OF THEIR DOCUMENTS IN ORDER TO MAKE PAULSON LOOK BAD AS IN THESE MULTIPLE MISSTATEMENTS OF FACT. DON'T EACH OF THE GOVERNMENTAL ENTITIES HAVE A MORAL AND LEGAL OBLIGATION TO TELL THE TRUTH? DOESN'T THE SUPREME COURT OF OREGON HAVE AN INDEPENDENT DUTY ON DE NOVO REVIEW TO SEARCH THE RECORD FOR THE TRUTH AND NOT JUST ACCEPT THE THINLY DISGUISED NEGATIVE SPIN BY THE BAR THAT IS MISLEADING AND BLATANTLY UNTRUTHFUL? THAT HAS NOT OCCURRED HERE.

The Truth: The truth is that Paulson arranged for Mr. and Mrs. Nutt to meet with Ridgeway (Dick) Foley, a noted Oregon appellate attorney in July of 1999 to review the merits of an appeal. Mr. Foley wrote a detailed five page, single-space analysis of the merits of their case on appeal and the costs on appeal. (Exhibit 103) The Nutts made their own decisions here and in all aspects of the case.

10. **"During that (January 25, 2000) hearing, the accused refused to stand when addressing the judge. . . ."** (Opinion Page 13) That is false. Paulson has always treated each judge with respect and stands when addressing this Court or any Court. What Judge Beckman is confusing is that Mr. Dunbar stood while Paulson was addressing the Court, while Paulson also was standing. Paulson stated to the Court that Mr. Dunbar was standing while Mr. Paulson was talking and asking if he, Paulson should continue while Mr. Dunbar was also standing. There is no occasion in this entire record where any judge asked Paulson to stand. There is no occasion in this entire record where any judge asked Paulson to stand and Paulson refused. This is simply made up facts to make Paulson look bad.

Paulson could address each and every subsequent chronological allegation in the Opinion, but it would serve no purpose. If the Oregon Supreme Court is going to be fair, then the above examples of where the Opinion conflicts with the facts in the record should suffice for its reconsideration of what the Court has done here. If the Court wants to make an example out of Paulson then all of the accurate facts in the world will not get in the way.

ARGUMENT

1. *DUE PROCESS AND EQUAL PROTECTION* – *The Supreme Court of the State of Oregon has denied its Oregon State Bar Member, Lauren Paulson, fundamental due process and equal protection of our laws by reading and fully considering the arguments of the Oregon State Bar and by not reading nor considering the arguments and evidence of the Oregon State Bar Member.* ***(App. 1)***

The due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Oregon Supreme Court and the Oregon State Bar seek to prevent Paulson from his right to earn a living and practice law. The guaranty of due process of law is one of the most important to be found in the United States Constitution or of any of the amendments and has been described as the very essence of a scheme of ordered justice. It is the primary and indispensable foundation of individual freedoms in the social compact between the rights of the individual and limitation on the power which the state may exercise. The fundamental guaranty of due process is absolute. It would be a denial of fundamental fairness, shocking to the universal sense of justice if a person is denied a right to earn a living by courts which do not read the file before them, the record or the briefs of the parties. Daniel Webster declared that due process means a court must hear before it condemns. *Trustees of Dartmouth College v. Woodward*, 17 US 518, 4 L Ed 629. It is the protection of people against having the government impose burdens upon them except in accordance with the valid laws of the land. This Court can point to not one law of the land Paulson has broken in handling the Nutt matter. Not one.

One must be allowed to be heard. One is not heard unless this Court considers all of the arguments Paulson lays before this court in the three briefs that Paulson has placed before this Court. To the contrary, this Court cannot point to a single specific argument, fact nor rule of law proffered by Paulson in the Opinion of June 8, 2006. Paulson is a ghost to the Oregon Supreme Court.

The Supreme Court Opinion suspending Paulson's right to practice law refers to none of the legal arguments asserted in his Opening brief nor Reply brief. The Supreme Court of Oregon Opinion's (Opinion) facts dated June 8, 2006 are taken almost verbatim from the Oregon State Bar's (OSB) Answering brief. For just a small example:

OSB's Answering Brief:	"In 1997, Jerry and Phyllis Nutt, a retired couple, sold their home in Aloha, Oregon and purchased a modular home for installation in Hebo, Oregon" (Ans. Br. Page 5)
Supreme Court:	"In 1997, Jerry and Phyllis Nutt, a retired couple, purchased a modular home for installation in Hebo, Oregon." (Opinion, Page 2)

The Opinions virtual verbatim recitation of the Bar's brief begins on Page 2 of the Opinion and continues to Page 16 of the Supreme Court's Opinion. These identical putative facts begin on Page 4 of the Bar's brief and continues to Page 29 of that pleading. The putative chronological recitation from the Bar's brief at Page 8 is captured virtually verbatim in the Opinion at Page 4. The first sentence of the Opinion on Page 5, second full paragraph is identical to the Bar's first sentence on Page 9, third full paragraph. And so on. There is nothing taken verbatim from either the one of Paulson's briefs. Nowhere

in the Opinion is there reference to the record regarding this factual recitation.

On the surface there is probably nothing wrong with reciting facts from one side's brief over another side's brief were they accurate and if such relevant facts were fairly taken from both sides. Neither is the case here. In essence, all of the facts submitted in pleadings (as opposed to the actual evidence submitted de novo) by the Bar are taken as true in the Opinion. In essence, none of the facts submitted by Paulson are taken as true in the Opinion. It is patent that no one at the Supreme Court of Oregon looked at any of the voluminous record submitted by stipulation. **(App 1)** Therefore, virtually all of the facts in the Opinion are taken from the Bar's brief and most incorrectly state the facts in the record, An examination of the record as simple as looking at the operative complaint on the day of trial would have eliminated the error cited above regarding what Nutt claims remained on the day of trial – July 1, 1999 – this was always the day set for trial not merely a hearing as stated many times in the Opinion. The reason there was a Rule 21 hearing set for that day is because Ball Janik was judge shopping. They were told by Judge Nely Johnson to take all Rule 21 motions to Judge Bearden. (See Exhibits 534-541) They did not obey her directions nor rulings.

Ms. Mary A. Cooper is the author of the OSB's Answering Brief. She was not the trial attorney. Thus, her familiarity with the facts is modest at best. For that reason, Paulson pointed out these manifold misrepresentations of the facts to Mary A. Cooper in a telephone call to her followed up by a letter to her dated December 15, 2005. **(App 10)** Moreover, Paulson pointed out these

blatant factual errors to the Oregon Supreme Court in the Reply brief to which the Opinion states:

> "As an initial matter, the accused challenges a number of the Bar's factual assertions or otherwise responds to those assertions. We have reviewed all the accused's specific arguments in that regard and conclude that we need not address those arguments because their resolution in the accused's favor would not affect our decision." (Opinion pp 16-17)

Why are Judge Beckman and the Supreme Court of Oregon able to simply ignore one sides legal arguments? Is the Supreme Court of Oregon saying that lies by one of the parties do not matter? The Code of Judicial Conduct states that "A judge shall be faithful to the law and shall decide matters on the basis of the facts and applicable law." JR 2-107 Moreover, there is a requirement to be fair to both sides. JR 2-110 (B)

Paulson's Reply Brief – The problem is that OSB's factual misrepresentations that were pointed out to the Supreme Court of Oregon in the Reply brief are to be found throughout the Opinion. This makes one wonder if Paulson's Reply Brief was read by anybody at the Oregon Supreme Court. For example:

OSB's Answering Brief: **"These motions were successful, and by the trial date – July 1, 1999 – the plaintiff's case had been whittled down to only one cause, against only one defendant (Gensman), with potential awardable**

damages of only $200.00. (OSB Ans. Br. P.3)

Paulson's Reply Brief: "By the trial date – July 1, 1999 – the plaintiff's case had the following remaining claims against these defendants for the following claims for relief:

A. Defendant Gensman, – Violation of ORS 59,840 which requires brokers like Gensman to make the required (TILA) disclosures. Damages were specified at $100,000 or in lesser amounts as are found according to the law and their proof at trial. Under ORS 59.925(7), the plaintiff would be entitled to their attorney fees.

B. Defendants Olson, Northwest Modular Homes and American Modular Homes, Inc. – Ten enumerated violations of Oregon's Unfair Trade Practices Act (ORS 646.608) for $100,000 in actual damages plus attorney fees pursuant to ORS 646.638

C. Defendants Olson, Northwest Modular Homes and American Modular Homes, Inc. – Breach of contract for $250,000 or in such lesser amounts are found according to the law and the plaintiffs' proof at trial.

D. Defendants Olson, Northwest Modular Homes and American Modular Homes, Inc. – Violation of the Contractor's Board statute, ORS 701.035, for $250,000 or in such lesser amounts as are proved at trial. In addition,

plaintiffs claimed their attorney fees under ORS 701.067.

E. All Defendants – The plaintiffs' claimed escrow funds of $10,000 being held by the title company on the construction loan also being claimed by Defendant Olson. (See Exhibit 510) (Reply Br. Page 4)

(In addition, the plaintiffs had an order of default against American Modular Homes, Inc. on their claims against that defendant.) These misrepresentations continue:

Opinion: **"On July 1, 1999, the Nutts appeared in court believing that they were going to try their case to a jury. The accused had not informed them that only the $200 UTPA claim against Gensman had survived summary judgment . . . "** (Opinion pp11-12)

OSB: **The Nutts appeared in court on July 1, 1999 with witnesses thinking that they were going to try their case to a jury. They were unaware that the only part of their lawsuit that had survived summary judgment was a $200 claim against Gensman.** (OSB Answering Br. Page 21)

Opinion: **On July 1, 1999, the Nutt appeared before the trial court, unaware that their case had been decimated by a series of Rule 21 and summary judgment rulings** (Opinion Page 21)

The OSB points to no specific part of the record for support for their factual allegation except "Nutt testimony and page 22 of their Trial Memo" The Oregon Supreme Court Opinion cites this factual procedural error *twice*. If the Supreme Court regards the factual errors pointed out by Paulson as meaningless as aforesaid in the Opinion at Page 16 then why does it refer to the erroneous facts twice in the Opinion?

The Supreme Court of the State of Oregon ignored the following arguments asserted by Paulson's Reply Briefs in this case:

- EX PARTE CONTACT – Justice Wallace Carson had with The Bar's President William Carter on this case. **(App 11)**
- DELAY CAUSING PREJUDICE – Bar Rule 2.4 (i)(2)(a) requires the Trial Panel to render a decision within 28 days. The Trial Panel did not render a decision for over 150 days. Are rules only applicable to the weak? May the Oregon Supreme Court simply ignore this rule without even commenting on the rule violation? Paulson also raised the issue of the Constitutional right to a speedy trial. (ER-56) Paulson pointed out two other recent Oregon Supreme Court cases where the Bar admitted delay, but got a free pass as here. (ER-55)
- MEDIATION – Paulson requested mediation in this case. The Bar adopted a rule (4.9) allowing for mediation. Jeff Sapiro does not like mediation, has never done a mediation and does not allow for mediation in the Oregon State Bar because he likes to

prosecute. This is prosecutorial misconduct and denial of equal protection of the laws.

- REPRISAL – All of Paulson's four page chart and argument on the Bar's reprisal is ignored. See Reply brief at pp 9-12

- TIMING MANIPULATION – The Oregon Supreme Court Opinion ignores the fact that Paulson was put in the awkward position of defending himself in this case (which by that time had been pending for six years) and defending his position on the Oregon State Bar's Board of Governors *at exactly the same time*. That is not a coincidence. The timing of both issues was in the control of the Oregon State Bar. Is that fair?

- FREE SPEECH AND FREEDOM OF THE PRESS – Mr. Carter and other members of Bar leadership did not like the fact that Paulson had been publishing a newsletter to his constituents. His suspension from the BOG truncated this newsletter. Isn't this one of the most fundamental rights we have?

- RULES BROKEN – Neither the Bar nor the Oregon Supreme Court can point to a single true fact (as opposed to the putative facts in the Bar's brief) that indicates that Paulson violated a single rule. Not a single specific rule. Not one.

- CONSTITUTIONALITY OF DR 1-102 – Paulson raised the issue of whether or not this disciplinary rule is unconstitutionally vague pointing eighteen Oregon cases where the rule has been used as a 'catch-all' to site

unwary lawyers who are simply being a zealous advocate for our clients. (ER 51-52)

- MOTION TO DISMISS – Paulson submitted a detailed Motion to Dismiss to the Trial Panel which should have been reviewed by this de novo process and was not.

It was a fundamental denial of equal protection of the laws for the Court to consider the arguments of the Bar yet not consider the arguments and read the record of Paulson's side of the case. The Bar no less than Paulson has a right to equally pursue their lawful objectives. Paulson should not be treated differently simply because he does not practice law as one would in downtown Portland. Paulson helps the meek, the helpless and the downtrodden. It is no accident the Nutts were stuck with a solo practitioner from Aloha on a contingency fee while Gensman was able to hire the downtown Portland law firm of Ball Janik. It is no accident that five of the last six Presidents of the Oregon State Bar have been from Portland, while Paulson, from Aloha is suspended from the Board of Governors for his alleged misdeeds in this case. If Jeff Sapiro is allowed to participate in the process to appoint Trial Panel members and the subjects of the disciplinary process are not also given a place at the appointments of the trial panel's table equally then there is a denial of the equal protection of the laws. No one has ever invited Paulson as a solo practitioner to join in the process of selecting Trial Panel members. No one has ever selected Paulson to join as Counsel to the State Professional Responsibility Board. Paulson was denied an equal opportunity to mediate this case since there is a law on the books (Bar Rule 4.9) permitting mediation, yet the prosecutor will not apply that law equally to Paulson. Equal

protection requires all people be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. This equality of protection is not only for all, but against all similarly situated. Immunity granted to a class, however limited, having the effect to deprive another class of a right is clearly a denial of equal protection of the laws. There are over 12,000 lawyers in Oregon. Almost half of those polled in 2002 felt there was bias in the disciplinary system. **(App 9)** In plain language, the downtown Portland lawyers in large firms are left alone while the small lawyers are picked off easily by our insulated Disciplinary Counsel. This is invidious discrimination.

2. REPRISAL AND FREE SPEECH

All of Paulson's four-page chart and argument on the Bar's reprisal against him is ignored in the Opinion. See Reply brief at pp 9-12 Because Bar leadership tossed Paulson off of BOG in October of 2004 that stopped Paulson's Region Four Quarterly Newsletter to his 1,000 member constituency. He had been publishing this newsletter since February of 2003, soon after he was elected to BOG. Individual BOG newsletters to their constituents now are a thing of the past. The Bar's reprisal against Paulson violated his First Amendment rights to free speech and freedom of the press. Karen Garst is the Executive Director of the Oregon State Bar. Paulson blew the whistle on her attempt to get the Bar to purchase her defunct church property of which she was a creditor without disclosure to the BOG. She assigned a special investigator to Paulson's cases. **APP**

3 RECUSAL – In April of 2004 the parties exchanged witness lists, Paulson identified several judges as witnesses including Judge Douglas Beckman because it is undisputed that he did not read the trial court file before dismissing the Nutt's case, **App** and Judge Johnson because she gave Paulson leave to raise additional issues on the summary judgment she rendered which Paulson did in writing, but were neither considered by her nor Judge Beckman. Paulson later found out that Judge Beckman had discussed this case with Dennis Rawlinson, the attorney for the Bar, without telling Paulson. While taking Karen Garst's deposition, Paulson found out that OSB Bar President William Carter had secretly talked to Justice Carson about this case. **(App 11)** Justice Wallace Carson then recused himself from this case after Paulson found out about this ex parte contact by taking the deposition of Karen Garst, Executive Director of the Oregon State Bar.

At oral argument Justice Michael Gillette openly taunted Paulson, Justice Balmer was similarly abusive. For that reason Paulson asked them to recuse themselves. **(App 2)** Neither did so, and neither asked another independent judge to objectively evaluate the facts for recusal as required by the U. S Supreme Court. **App**

4. PROSECUTORIAL MISCONDUCT

- Mr. Sapiro is formally anointed as the "counsel" to the State Professional Responsibility Board (SPRB) which is the grand jury for Oregon's Disciplinary process [BOG Bylaw 18.100]

- Any complaints about Mr. Sapiro must go to the SPRB for investigation. Thus, under our

rules, the client – *the SPRB – is the only entity that investigates misfeasance (ie. reprisal) of Oregon's Disciplinary Counsel, and their lawyer. In short, our rules require the client (the grand jury) to be the only entity to investigate the alleged misfeasance of their attorney, the prosecutor. [Bar Rule 26(g)]*

- Oregon's Disciplinary Counsel, Jeff Sapiro, regularly attends and participates in the selection of the disciplinary process judges. The law requires that the Supreme Court of Oregon appoint the disciplinary trial panel (the judges for the disciplinary process) members. ORS 9.534 However, that is not how the disciplinary trial panel is selected. It is the BOG Appointments Committee that actually selects the trial panel members. Paulson was a member of the BOG Appointments Committee. He and the tapes of the meetings can verify that Jeff Sapiro regularly attends and participates in the BOG Appointments Committee selection process. The Supreme Court of Oregon rubber stamps the nominations submitted by BOG. The Supreme Court is not told the prosecutor participates in the selection of the trial panel members.

Thus, Oregon's Disciplinary Counsel attends each meeting of the SPRB *and basically tells them who to indict and who not to indict. Then the Disciplinary Counsel participates in selecting the judges who decide these disciplinary cases. Jeff Sapiro as Disciplinary Counsel is the judge, jury and hangman in these disciplinary cases.* ***(App 3)***

THE GENSMAN CASE IS BUT A PRELUDE TO DISBARRING PAULSON ALTOGETHER. WHY? BECAUSE PAULSON MADE A BAR COMPLAINT AGAINST SAPIRO FOR DELAYING HIS INVESTIGATION IN THIS MATTER FOR ALMOST A YEAR. BECAUSE PAULSON IS A WHISTLE BLOWER ON MISFEASANCE OF THE BAR'S EXECUTIVE DIRECTOR, BECAUSE PAULSON IS WEAK AND BECAUSE BAR LEADERSHIP CAN.

CONCLUSION

"In this case, the accused brought claims that lacked merit and continued to pursue those claims long after it would have been apparent to any reasonable lawyer that the claims were exceedingly weak and that it was not in his clients' best interest to pursue them. *He conducted the state court litigation in an irresponsible and amateurish manner to the prejudice of his clients.*" (Opinion, Page 23) First Paulson fully analyzed each aspect of the Nutts claims. (Exhibit 68) Moreover, Paulson sought help before proceeding at each juncture, with Mr. Lindberg on the Truth in Lending Act (TILA) (Exhibit 550), with Mr. Foley on the Appeal (Exhibit 103), and with Mr. Glusencamp on bankruptcy. The claims were exceedingly strong. Mr. Gensman made none of the disclosures required by TILA and charged the Nutt's [sic] too much interest. Mr. Olson's actions in using someone else's letterhead as a would-be contractor is patently fraud and he was in clear violation of the assumed business name law. The Nutts have a default order against American Modular Homes which is still viable because no final judgment has been entered in this case. The appeal has merit because Judge Nely Johnson clearly never understood the finer points of the

TILA law and had agreed to consider any additional issues raised by Paulson which he did in his letter to her dated June 28, 1999. Those issues have never been addressed by anyone.

What made this case a disaster for the Nutts is the procedural chaos that reigns in Multnomah County with Judge Bearden handling the Rule 21 Motions, Judge Johnson handling the Summary Judgment Motions (and requiring five hearings all because she didn't understand the issues), Judge Kantor handling the Default Order, Judge Ellis handling the Motion to Compel and miscellaneous matters, Judge Beckman not reading anything before ruling for another downtown firm, and Judge Marcus being handed the hot potato which still sizzles.

But, why does the Oregon Supreme Court have to go out of ones way to use salacious words like irresponsible and amateurish. This is the sort of taunting and abuse that Paulson complained about to Justice Balmer and Justice Gillette that was meted out by them to Paulson at oral argument. **(App 2)** If, and only if, a Supreme Court Justice has read every page of the record in this case and still feels that those words should be used with respect to Paulson's efforts on the Nutts behalf, then one will stand before the mast. Otherwise, such denigration is gratuitous and not necessary. If the Oregon Supreme Court will look at the actions of Judge Johnson, Judge Kantor and Judge Beckman neutrally and thoroughly, then Paulson will stand before the mast. Otherwise, such denigration is not appropriate. If the Oregon State Bar will look at the actions of the other attorneys in this case neutrally and without bias then Paulson will stand before the mast. Did anyone notice that Ball Janik illegally garnished the Nutts pension funds that were exempt from garnishment?? It

wasn't Paulson that lead to the Nutt's miseries, it was Judge Beckman.

The catch-all rule that deems that conduct prejudicial to the administration of justice is enough notice to lawyers so they can tailor their conduct accordingly fails. The myriad of cases cited in Paulson's Trial Memorandum at ER-50 to ER-52 amply demonstrates that no lawyer can possibly know when the Disciplinary Counsel's office might summon them into Mr. Sapiro's office for that 'special investigation'

The Oregon Supreme Court should reconsider their Opinion of June 8, 2006 in light of the true facts in the record.

DATED this 28th day of June, 2006.

/s/ Lauren Paulson
LAUREN PAULSON,
OSB 73232

I hereby certify that the foregoing Petition for Reconsideration of Lauren Paulson is a certified true copy of the original herein.

/s/ Lauren Paulson
LAUREN PAULSON,
OSB 73232

Brenda Tiland
Paralegal/
Office Manager

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[LOGO]
M.E. Blanton House
circa 1911
National Registry of
Historic Places

July 17, 2006

Hon. Paul J. De Muniz
Oregon Supreme Court
1163 State St.
Salem, OR 97301

Re: Lauren Paulson
OSB No. 01-100
SC S52465

Dear Judge De Muniz:

Enclosed please find my Emergency Motion for Stay of the Oregon Supreme Court June 8, 2006 Opinion in the captioned matter filed in the Ninth Circuit in the case of *Paulson v. Carter,* et al., Docket No. 06-35260, DC No. CV-04-1501-KI.

Please note I am asking the Ninth Circuit to take judicial notice of the captioned case. May I request a certified copy of the entire record in the captioned case for forwarding to the Ninth Circuit.

If there are charges, please advise and I will certify funds for payment. Thank you for your interest and consideration in these regards.

Very truly yours,

Lauren Paulson

cc: Mary Cooper
Willamette Week
Susan Eggum
The Argus (Kurt Eckert)
Oregonian (Tony Green)

SUPREME COURT [SEAL] COURT OF APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97301-2563

[Name and Phone Numbers Omitted in Printing]

August 9, 2006

Lauren Paulson
Attorney at Law
3980 S.W. 170th Ave.
Aloha, OR 97007

RE: *In Re. Lauren J. Paulson*
Oregon Supreme Court case no. S52465;
Oregon State Bar Case no. 01-100

Dear Mr. Paulson:

My letter today is informative about the copies you requested of the above-entitled case. An advance payment for the copies is not requested at this time.

On July 31, 2006, I was given your letter of July 17, 2006, in which you request certified copies of the entire record for the above-entitled case. The total number of pages of the record is 7,684 pages. At .25¢ per page the cost for one complete copy of the record is $1,921.00. The cost for making the record an exemplified certified copy is an additional $1.00. There are 5 VHS tapes of Paulson exhibits 57 and 59. This office has not determined whether it is possible to make certified copies of those exhibits, so the cost for those exhibits cannot be determined at this time.

The Director of the Appellate Court Services division is in the process of determining who will make the copies, and how the copies will be made. This office may need to

work with an outside agency to make the copies. This office may need to add to the cost for copies an additional amount for the labor involved, but I do not have that information at this time.

You requested by telephone two complete exemplified copies of the entire record. The cost would be an advance payment of $3,844.00, and possibly more depending on what the Director can determine about making the copies. This office is not requesting any payment at this time because the copying process is being determined.

Sincerely,

/s/ John Koskela
John Koskela
Records Section
503.986.5546

By Fax Only – 503-986-5560

August 14, 2006

John Koskela
Records Section
Supreme Court of Oregon
1163 State St.
Salem, Oregon 97301-2563

Re: In Re: Lauren Paulson
Oregon Supreme Court No. S52465
US. Court of Appeals Ninth Circuit No. 06-35260

Dear Mr. Koskela:

Thank you for yours of August 9, 2006 with the information provided.

As always, I am appreciative of any savings that can be made in the way the record is copied and at the same time I understand the problems of the size of the record in this case.

While I am not sure of the semantics, my goal is to get the Ninth Circuit a certified copy of the entire record in this case for their Docket No. 06-35260. At the same time I need to have an exact replicated copy of the record in this case.

I am happy to advance the funds when ascertained. Thank you for your cooperation in these regards.

Very truly yours,

Lauren Paulson

cc: Greg Miner
Ninth Circuit

Brenda Tiland
Paralegal/
Office Manager

LAUREN PAULSON
ATTORNEY AT LAW
3980 S.W. 170th Ave.
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[LOGO]
M.E. Blanton House
circa 1911
National Registry of
Historic Places

August 21, 2006

Hon. Paul De Muniz, Chief
Oregon Supreme Court
1163 State St.
Salem, OR 97310-0260

Re: Lauren Paulson
SC S52465

Dear Supreme Court Justice:

I received notice that the Supreme Court of Oregon has considered my Petition for Reconsideration in the captioned matter and ordered that it be denied. In addition to the gratuitous defamation, this means I will be suspended from the practice of law for six months.

On June 19, 2006, I asked Chief Justice De Muniz whether any member of the Oregon Supreme Court read the entire record before issuing the June 8, 2006 Opinion in this case and he did not reply. (Exhibit 1) The purpose of this letter is to ask three short questions of you regarding this case.

1. Did you read the entire record including the briefs in this case prior to this Court's Opinion of June 8, 2006?

2. Did you read my Motion for Reconsideration including attachments in their entirety?

3. Since I filed my Motion for Reconsideration did you examine any portions of the record in this case following the June 8, 2006 Opinion and before the August 15, 2006 denial of the Motion for Reconsideration, and if so which parts?

I requested a certified copy of the entire record of this case on July 17, 2006, and have been making appropriate arrangements with John Koskela in your records department for an exact copy of the record which was available to you for your consideration. By a copy of this letter to him, I am requesting whether any member of the Oregon Supreme Court has asked to see any part of the extant record of this case since the Motion for Reconsideration was filed.

The relevance of these requests spring from the following:

- The Trial Judge did not read the court file before ruling. – It is undisputed that the Trial Judge in the underlying case, the Honorable Douglas Beckman, did not read any of the six volumes of the trial court file before kicking Mr. and Mrs. Nutt's case out of court where it had been pending for almost a year. We know this because three volumes of the trial court file were from another case and one volume was completely missing. Moreover, Judge Beckman admitted in his deposition that the only pleading of this complicated Truth-in-Lending case that he ever read was the complaint prior to dismissing the entire case (notwithstanding that there was an extant default order in favor of the Nutts).

- There is real doubt if The Supreme Court of Oregon read the Mandamus documents in the Nutt case. – Following Judge Beckman's cursory disposition of the Nutt's case without reading nor having even half the file on the morning of trial, I filed a Mandamus Petition including a memorandum of law in the Supreme Court to require Judge Beckman to comply, in essence, with the *Superbilt*[1] case. Having just definitively ascertained that Judge Beckman had not read any of the Trial Court file before making dispositive rulings I became very suspicious of whether the Supreme Court of Oregon also made dispositive rulings without reading the materials submitted. I became suspicious for this reason: *I mailed the (voluminous) Mandamus Petition to the Oregon Supreme Court on November 3, 1999. It was received by the Oregon Supreme Court on November 4, 1999. On November 5, 1999 Keith Garza, Staff Attorney to the Supreme Court, called me with the Court's ruling denying the Mandamus Petition.* Documentation of that time line is attached. (Exhibit 2)

  I then sent a letter to the Oregon Supreme Court inquiring, inter alia, whether any Oregon Supreme Court Justice read anything I submitted regarding the Mandamus Petition and if so, which Justice actually read the entire mandamus submission. (Exhibit 3) The reply from Mr. Garza did not answer that question and is attached. (Exhibit 4)

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[1] *State of Oregon by and through it's* [sic] *State Highway Commission et al., v. Superbilt Manufacturing Co., et al.*, 204 Or 393, 281 P.d. 707 (1955)

> The Oregon State Bar's (Second Amended) formal complaint in this disciplinary case alleged at ¶ 5(n) that my asking the Supreme Court whether anybody read my Mandamus Petition was conduct prejudicial; to the administration of justice. In other words, it is a disciplinary violation, according to the Oregon State Bar, for a lawyer to ask a judge whether they have read the materials submitted before making dispositive rulings.

Justice De Muniz was recently quoted in the Oregon State Bar Bulletin:

> "The judiciary solves problems and upholds the rule of law, while the public respects the judiciary's authority and enables judges to do their jobs. **A failure anywhere in the system threatens the entire arrangement**" (July, 2006 Edition, Vol. 66, No. 9, Page 10) [Emphasis supplied] (Exhibit 5)

It is a sure thing that Phyllis and Jerry Nutt do not respect Oregon's judiciary.

• There is a bona fide question as to whether any member of the Supreme Court of Oregon has read the entire record in this disciplinary proceeding as required by 'de novo review'. – I have previously briefed to you exactly where the Bar has the facts plainly wrong and objectively wrong. Indeed, the Bar has most of the facts wrong and those erroneous facts are parroted in this Court's June 8, 2006 Opinion. There is no evidence in any of the Oregon Supreme Court rulings that any individual member has read *a single thing have* [sic] *submitted in this case.* But, here is what I cannot fathom. The Oregon State Bar has clearly showered you with a blizzard of stark lies in their

brief in this case and at oral argument. I have specifically pointed out where they have **lied** to you in my Reply brief and in my Motion for Reconsideration. Your incurious rulings here has [sic] put the Oregon Supreme Court's stamp of approval on lawyers at the Oregon State Bar being able to lie to you about the actions of honest, hard working Oregon lawyers in disciplinary proceedings. I have previously pointed out to you that *in a survey conducted by the Oregon State Bar in 2002, **47.1% of the Members of the Oregon State Bar believe there is bias in the disciplinary system.*** (Exhibit 6)

For the good of the Bench and the Bar do you not have an affirmative duty to specifically explore and respond to my allegations of the bald, intentional misrepresentations by the lawyers at the Oregon State Bar in this instance? (See 4.1 and 8.3 of the Code of Professional Responsibility) This Court is the bulwark against the excess of governmental action against Oregon's citizens. I simply seek affirmation that this Court (or at least one member of this Court) reads everything required in a *de novo review.* If I cannot get this affirmation then the lawyers who practice before this Court and the citizens of Oregon who are effected [sic] by this Court's decisions have reason to wonder if there isn't "(a) failure in the system (which) threatens the entire arrangement."

If you can't provide that affirmation, then these proceedings are certainly not about truth nor the Rule of Law. That would be a tragedy for Oregon jurisprudence. I hope to hear from you in these regards.

Very truly yours,
/s/
Lauren Paulson

cc: Mary Cooper
Greg Miner
Media

Brenda Tiland
Paralegal/
Office Manager

Julie Carlile
Legal Secretary

LAUREN PAULSON
ATTORNEY AT LAW
3980 S.W. 170th Ave.
ALOHA, OREGON
97007
TELEPHONE
(503) 591-1819
e-mail: ljpaulson@
worldnet.att.net

[LOGO]
M.E. Blanton House
circa 1911
National Registry of
Historic Places

By Fax Only – 503-986-5560

August 21, 2006

John Koskela
Records Section
Supreme Court of Oregon
1163 State St.
Salem, Oregon 97301-2563

Re: In Re: Lauren Paulson
Oregon Supreme Court No. S52465
U.S. Court of Appeals Ninth Circuit No. 06-35260

Dear Mr. Koskela:

Please see my letter to individual members of the Oregon Supreme Court. If you are able to respond, did any member of the Oregon Supreme Court request access to the record from June 28, 2006 when I filed my Motion for Reconsideration to August 15, 2006 when they issued the denial?

Thank you for your interest and consideration of this request.

Very truly yours,
/s/ Lauren Paulson
Lauren Paulson

cc: Greg Miner
Ninth Circuit

SUPREME COURT [SEAL] COURT OF APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97301-2563

[Name and Phone Numbers Omitted in Printing]

August 29, 2006

Lauren Paulson
Attorney at Law
3980 S.W. 170th Ave.
Aloha, OR 97007

RE: *In Re. Lauren J. Paulson*
Oregon Supreme Court case no. S52465;
Oregon State Bar Case no. 01-100

Dear Mr. Paulson:

You have requested copies of documents in Oregon Supreme Court case no, S52465; Oregon State Bar Case no. 01-100,

On August 16, 2006, the State Court Administrator issued the appellate judgment in the above-entitled case, and at time the exhibits were returned to the Oregon State Bar. The State Court Administrator retained the appellate files and the transcripts. The appellate files include documents filed during the appellate review process and the filings before the Bar that occurred during the trial panel proceedings, excluding the exhibits.

The four appellate files, the briefs, the petition for reconsideration, plus two volumes of transcript total 1,917 pages.

Upon receipt of your payment of $480.25, this office will make an exemplified, certified copy of the documents

that remain with the State Court Administrator. If you want two exemplified, certified copies, then please provide $960.50. You can expect to pick up your copies 10 business days after receipt of your payment.

The exemplified copy or copies will not include letters sent to the Supreme Court Justices after the appellate judgment was issued, and will exclude letters not addressed for fling [sic] in accordance with ORAP 1.35(1). The folded charts that were not offered or admitted into evidence during the trial panel proceedings will not be included, as they were not filed and were not considered by the court.

In order to obtain certified copies of the exhibits you will need to make arrangements with the Oregon State Bar.

Sincerely,

/s/ John Koskela
John Koskela
Records Section
503.986.5546

c: Mary Anne Cooper

Brenda Tiland
Paralegal/
Office Manager

Julie Carlile
Legal Secretary

LAUREN PAULSON
ATTORNEY AT LAW
3980 S.W. 170th Ave.
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e-mail: ljpaulson@
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[LOGO]
M.E. Blanton House
circa 1911
National Registry of
Historic Places

September 1, 2006

Hon. Paul J. De Muniz
Oregon Supreme Court
1163 State St.
Salem, OR 97301-0260

Re: Lauren Paulson
SC S52465

Dear Supreme Court Justice:

The question in the captioned matter is whether *any* single member of the Oregon Supreme Court read completely the entire record including my submissions, before rendering its Opinions dated June 8, 2006 and August 16, 2006.

To find an answer to that question I wrote to Chief Justice Paul De Muniz on June 19, 2006. *He did not reply.*

Then I asked that the entire record in this case be certified on July 17, 2006 and copied to protect the record on appeal to the U.S. Supreme Court. Initially, Mr. Koskela formally agreed to do this and outlined processes and costs to which I formally agreed. On August 21, 2006 I sent you and each member of the Oregon Supreme Court the enclosed letter. *No one has replied.*

Yesterday, I found out by John Koskela's letter of August 29, 2006 that after the August 16, 2006 decision to deny my Motion for Reconsideration, that the record was returned to the Oregon State Bar **without** being copied as the Oregon Supreme Court had previously promised.

My purpose in writing to you now is to be sure that you received my letter of August 21, 2006 and to ask plainly – am I being railroaded?

Very truly yours,
/s/
Lauren Paulson

cc: Greg Miner

SUPREME COURT [SEAL] COURT OF APPEALS

SUPREME COURT BUILDING
1163 STATE STREET
SALEM, OREGON 97301-2563

[Name and Phone Numbers Omitted in Printing]

September 28, 2006

Lauren Paulson
Attorney at Law
3980 S.W. 170th Ave.
Aloha, OR 97007

RE: *In Re Lauren J. Paulson,* Supreme Court case number S52465; your letters dated August 21 and September 1, 2006 to Chief Justice De Muniz

Dear Mr. Paulson:

Your letters have been referred to me for a response.

You have asked, in varying forms, whether and to what extent one or more justices of the Supreme Court reviewed the entire record before initially deciding this case on its merits. You also have asked whether your petition for reconsideration was read in its entirety.

Your petition for reconsideration together with your letters dated June 19 and July 17, 2006, were distributed to the members of the court before the conference at which the petition was considered. At all times in your case and in every case that comes before the court, the court considers the case consistent with its review authority.

Regarding your request for two certified copies of the record, you are correct that we returned to the Oregon

State Bar the portion of the record consisting of the record made before the trial panel. That action was consistent with ORAP 3.50, which provides that "[w]hen the appellate judgment issues, the Administrator shall return the trial court or agency record, file, and exhibits to the trial court or agency." The disciplinary action imposed by the court would not become effective until the appellate judgment issued. Therefore, it was necessary to issue the appellate judgment after the court denied reconsideration and, at the same time, return the record received from the Oregon State Bar to the Bar.

However, we have been assured by the Oregon State Bar that it has retained possession of the record as received from the court and, upon our request, will return it to the Court for the requested copying.

We have not yet resolved who will undertake the task of copying the voluminous record or whether there will be additional cost for outsourcing that task. However, rather than further delay the matter, if you will forward the amount identified in John Koskela's letter of August 9, 2006, ($3,844), upon receipt of that amount, we will retrieve the Bar's portion of the record and arrange to have two copies made of the entire record as described in Mr. Koskela's letter of August 9, 2006. If the cost of making and certifying the copies exceeds $3,844, we will bill

you for the additional amount; if the cost is less than that amount, we will refund the difference.

Sincerely,
/s/ James W. Nass
James W. Nass
Appellate Legal Counsel

c: Chief Justice Paul De Muniz
Scott Crampton
John Koskela
Martha M. Hicks

OREGON SUPREME COURT [SEAL]
1163 State Street
Salem, Oregon 97310-0260
FAX (503) 373-7536

[Phone Numbers Omitted In Printing]

December 23, 1999

Lauren Paulson
3980 S.W. 170th Ave.
Aloha, OR 97007

Re: Nutt et al. v. Business Resource Group, Inc., et al., (SC S46930)

Dear Mr. Paulson:

I am responding to your December 20, 1999 letter. The letter identifies Mr. and Mrs. Jerry Nutt as copyees. It does not indicate, however, whether the other counsel in this proceeding were sent copies. Accordingly, I am sending the other counsel a copy of this response together with a copy of your letter.

In response to your request for a copy of internal rules respecting mandamus and reconsideration, the Supreme Court does not have internal rules. (Compare Internal Practices of the Court of Appeals of Oregon (1991).)

In response to your request for the names of the judges who participated in the mandamus and reconsideration dispositions in this proceeding, I have reviewed the results from the conferences at which the court decided those matters. The results do not show any justice not

participating. Accordingly, both matters appear to have been decided by the full court.

Sincerely,

/s/ Keith M. Garza
Keith M. Garza
Staff Attorney to the
Oregon Supreme Court

KMG:lk
cc: John Dunbar
J. Matthew Patton
Don Olson

Susan K. Eggum, OSB No. 82457
SUSAN K. EGGUM, P.C.
Attorneys at Law
621 S.W. Alder Street, Suite 600
Portland, Oregon 97205
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e-mail: susan@eggum.com

Of Attorneys for Defendants William Carter, The Oregon State Bar, Karen Garst, George Riemer, Lisa LeSage, Dennis Rawlinson, Nena Cook, and Jeff Sapiro

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LAUREN PAULSON,
Plaintiff,

v.

WILLIAM CARTER, President of the Oregon State Bar, THE OREGON STATE BAR, KAREN GARST, GEORGE RIEMER, LISA LESAGE, DENNIS RAWLINSON, NENA COOK and JEFF SAPIRO,
Defendants.

Case No. CV 04 1501 HU

DECLARATION OF WALLACE P. CARSON, JR. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Wallace P. Carson, Jr. under penalty of perjury, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the Chief Justice of the Oregon Supreme Court.

2. At an event we both attended (perhaps a luncheon immediately preceding the April 21, 2004 spring lawyer

admission ceremony), I recall former Oregon State Bar President William Carter stating to me that one of his fellow Board of Governors members, Lauren J. Paulson, had indicated an intent to subpoena me for a deposition in connection with Mr. Paulson's defense of a formal disciplinary prosecution. Mr. Carter and I had no further conversation any way related to Mr. Paulson, other than my stating "thank you for informing me" or words to that effect. I can recall no other conversations or communications with Mr. Carter in any way related to Mr. Paulson.

3. The Oregon Supreme Court, not the Oregon State Bar Board of Governors, appoints Oregon State Bar Disciplinary Board members. On January 19, 2005, the Oregon Supreme Court, at its monthly Public Meeting, considered an Oregon State Bar Board of Governors' recommendation concerning the adoption of an amendment to Bar Rule of Procedure 2.4(d), among other agenda items. Specifically, the Board of Governors recommended the adoption of the same suspension-of-service rule for Oregon State Bar Disciplinary Board members as forth in Bar Bylaw 18.6.

4. In preparation for the January 19, 2005, meeting at the Oregon Supreme Court to consider the Board of Governors' recommendation, I received correspondence and enclosures from the Bar's General Counsel, George A. Riemer, dated December 22, 2004. A true copy of Mr. Riemer's correspondence and enclosures is attached as Exhibit 1. I distributed copies of Exhibit 1 to my fellow members of the Oregon Supreme Court.

5. Mr. Riemer's letter of December 22, 2004, disclosed that there was a lawsuit pending in the U.S. District Court for the District of Oregon challenging the

validity of Bar Bylaw 18.6, and that the plaintiff was seeking a preliminary injunction. I recall that Mr. Riemer and Mr. Mark B. Comstock, a member of the Board of Governors, attended the January 2005 meeting. I believe I asked whether the U.S. District Court had ruled on the plaintiff's request for a preliminary injunction, and was informed that the Court denied the request. The Board of Governors' recommendation to amend Bar Rule of Procedure 2.4(d) then was approved by the Oregon Supreme Court.

6. Other than the content of Mr. Riemer's December 22, 2004 transmittal, and the response to my question at the January 2005 meeting, I have had no communications with Mr. Riemer or, any other Oregon State Bar staff, or member of the Board of Governor's, about Mr. Paulson, other, as noted, than being informed earlier in 2004 by Mr. Carter of Mr. Paulson's apparent intent to subpoena me for a deposition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on the 12th day of October, 2005.

/s/ [Illegible]
Chief Justice Wallace P. Carson, Jr.

[SEAL]

OREGON SUPREME COURT
1163 State Street
Salem, Oregon 97310-0260
FAX (503) 373-7536

[Phone Numbers Omitted In Printing]

January 26, 2000

Mr. Lauren Paulson
3980 S.W. 170th Avenue
Aloha, OR 97007

Re: *Nutt et al. v. Business Resource Group, Inc., et al.*, (SC S46930)

Dear Mr. Paulson:

The Chief Justice has asked that I respond to your January 13, 2000, letter. Regarding your request for the names of the judges who participated in the mandamus and reconsideration dispositions in this proceeding, as I noted in my December 23, 1999, letter to you, the court's records reflect that both matters were considered *en banc*, which means that all members of the court considered the pertinent materials and participated in the decision.

Sincerely,

/s/ Keith M. Garza
Keith M. Garza
Staff Attorney to the
Oregon Supreme Court

KMG:lk

cc: John Dunbar
J. Matthew Patton
Don Olson

DEPOSITION EXHIBIT #3

Karen Garst

From: WilCar@aol.com
Sent: Tuesday, October 21, 2003 1:46 PM
To: kgarst@osbar.org; charlie@kelrun.com
Subject: BOG Issues

Charlie & Karen:

I have set out below a blind copy of the email I have sent to Lauren. If he is going to be the crisis of my presidency, we might as well get on with it.

Lauren:

I've had a chance to review your memo of 10/17/03 to Charlie and me regarding new member orientation, and I think there is a lot of merit to some of your ideas, particularly the idea of matching new members to veterans. I'm not sure I agree with an executive committee of chairs, as it would be just another layer of bureaucracy.

I also read your newsletter to your Region members, and was frankly a little disappointed. In our good discussion of yesterday, I thought we were in agreement that we need to work toward improving the relationship between the leadership and membership.

Your suggestion that Sylvia "orchestrated" the ORPC changes (the BOG created the special committee and the BOG ratified its conclusions – she was just staffing the issue at our direction), and that the leadership and/or staff is somehow at odds with the membership ("Is the OSB running the membership") was counterproductive to the very goal that we discussed. If you believe, as I do, that we

need to be more responsive to the membership, you as a BOG member are in an ideal position to help improve that situation. Fanning the flames of dissatisfaction or dissension isn't the way to do it.

As sole practitioners from smaller communities, I think we share a lot of perspectives as to how the bar should be run and how it can be improved. I hope we can work together with the full board to improve the organization and make the members happier with us, rather than more dissatisfied.

I look forward to discussing these issues further with you.

Bill Carter
wilcar@aol.com
Office phone 541-773-8471
Cell phone 541-944-0945

1/26/2005

Karen Garst

From: **Karen Garst**
Sent: **Tuesday, January 13, 2004 4:03 PM**
To: **(e) Nena Cook**
Subject: **RE: Minutes**

Thank you!

I just received a copy of a letter from Lauren to Discipline. It's getting pretty bad there too. I am going to talk to Jeff about a special investigator in Lauren's cases.

KG

-----Original Message-----

From: Nena Cook [mailto:Nena@sussmanshank.com]
Sent: Tuesday, January 13, 2004 2:09 PM
To: 'Karen Garst'
Subject: RE: Minutes

Thanks, Karen. I have already figured out what I'm going to say to him and hopefully we'll see a difference in his approach as soon as the January Board meeting. I'll let you know how it goes.

I've reviewed the minutes from both committees and think they're perfect.

Thanks as always for all your thoughtful work.

Nena Cook – Attorney
503.243.1626 (Direct)
nena@sussmanshank.com

Sussman Shank LLP | 1000 SW Broadway, Suite 1400 | Portland, OR 97205-3089 | 503.227.1111 | 503.248.0130 (fax)
---Visit our WEB site at www.sussmanshank.com---

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-----Original Message-----

From: Karen Garst [mailto:kgarst@osbar.org]
Sent: Tuesday, January 13, 2004 1:53 PM
To: (e) Nena Cook
Subject: RE: Minutes

In person would be much better I think. That's fine.

Here are docs in Word. They actually were in Word, but when I send from Home it makes a different

* * *

[LOGO]

LAUREN PAULSON
ATTORNEY AT LAW

3980 S.W. 170TH AVE.
ALOHA, OREGON 97007
TELEPHONE (503) 591-1819
E-MAIL: LJPAULSON@WORLDNET.ATT.NET

Brenda Tiland
Paralegal/Office Manager

June 19, 2006

Hon. Paul J. De Muniz
Oregon Supreme Court
1163 State St.
Salem, OR 97301

Re: Lauren Paulson
OSB No. 01-100
SC S52465

Dear Judge De Muniz:

The purpose of this letter is to request an opportunity to examine the entire evidentiary record reviewed by the Oregon Supreme Court and upon which the June 8, 2006 decision regarding the captioned case is based.

The reason I make this request, and with all due respect, is threefold:

1. **The Record** – The July 1, 1999 proceedings before Judge Beckman were so unusual, I caused to be examined the entire Nutt v. Gensman Multnomah County Circuit trial court file No 9804-03034 that was in his possession on that date. As I pointed out in my Reply brief to this Court, it turned out that three of the six volumes of this trial court file belonged to other Multnomah County cases (#9804-03042, #9804-03043 [200

pages] and #9805-03250) and 7 pleading packets **were entirely missing.** (One of the major pleading packages missing from the trial court file was *the Nutt's Response to Gensman's Motion for Summary Judgment.*) This is documented in my Motion for a New Trial on the Nutt's behalf dated September 2, 1999, by the Carlisle affidavit dated August 26, 1999 and is documented in my briefs before your Court.

Volume 3 of the Nutt Multnomah County trial court file **is still missing.** (See Judge Beckman's Deposition dated August 27, 2004 at Pages 28-29).

So, I would like to examine the exact record upon which the Supreme Court of the State of Oregon rendered its de novo review and decision of June 8, 2006 in my case. It is clear that Judge Beckman made his pivotal ruling on July 1, 1999 dispatching the Nutt's claims to oblivion without reading much if anything of their six volume file.

2. **Certification** – Since Judge Beckman has admitted that he ". . . just read(s) what (he) think(s) is necessary" (Judge Beckman Deposition Page 28) before making final dispositive rulings and only read **one** pleading of the Nutt's, the complaint, before dismissing the case (Judge Beckman Deposition Page 41), I have the following request. Will the Supreme Court of Oregon certify that at least one justice of the Supreme Court of Oregon has read the entire record and all the briefs in this case which resulted in the decision of June 8, 2006? If not how does a Judge Beckman or a justice on the Supreme Court of Oregon know what part of the record is necessary to read and what is not necessary to read when making a final and binding ruling on an important case that has a voluminous record such as this one?

In short, for the addition reasons which will follow in my Motion for Reconsideration, is there any actual standard that requires Oregon judges and Justices of the Supreme Court of Oregon to read *any part* of the record before they make decisions that impact peoples lives? If no Oregon Justice of the Supreme Court read the entire record in this case how can it render a judgment?

3. **Ex Parte contact and Secret Proceedings –** Without either one telling me, Justice Wallace Carson (who has now recused himself from this case) and then-President of the Oregon State Bar, William Carter, spoke to each other *about this case* while it was pending before the Supreme Court of the State of Oregon. (See Carter letter dated September 4, 2004) Without either one telling me, Judge Douglas Beckman spoke with now-President of the Oregon State Bar *about this case.* (See Board of Governors [BOG] Minutes dated August 13-14, 2004) The Oregon Constitution bars secret court proceedings. (Article I, Section 10) I only found out about these illegal ex parte contacts through discovery and by reading the BOG minutes.

Can the Supreme Court of Oregon and Oregon State Bar assure me that there have been no other 'secret court proceedings' pertaining to this case?

Thank you for your interest and consideration in these regards.

Very truly yours,

Lauren Paulson

cc: Mary Cooper
Willamette Week
The Argus (Kurt Eckert)
Oregonian (Tony Green)

IN THE SUPREME COURT OF THE STATE OF OREGON

In re:	)	
	)	
Complaint as to the Conduct of	)	OSB Case No. 01-100
	)	
LAUREN J. PAULSON,	)	SC S52465
	)	
Accused.	)	
	)	

OREGON STATE BAR'S RESPONDENT'S BRIEF AND EXCERPT OF RECORD

Mary A. Cooper, Esq.,
OSB No. 91001
Assistant Disciplinary Counsel
Oregon State Bar
5200 SW Meadows Road
Lake Oswego, OR 97035-0889
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Attorneys for Oregon State Bar

Lauren J. Paulson, Esq.,
OSB No. 73232
3980 SW 170th Avenue
Aloha, OR 97007
Telephone: (503) 591-1819

Accused

I. STATEMENT OF THE CASE

The Bar rejects the Statement of Case submitted by the Accused as insufficiently detailed and would substitute the following:

A. Nature of the Proceeding.

The Oregon State Bar filed a Formal Complaint against the Accused on January 21, 2003. The complaint was twice amended (Second Amended Complaint attached as ER-1) and the Accused answered the Second Amended Complaint (Answer attached as ER-12) on December 5, 2003. A hearing was held on September 13, 2004, before a trial panel. Much of the evidence was admitted through a stipulation that eliminated the need for live testimony. The parties presented closing arguments on November 2, 2004.

On April 8, 2005, the panel issued an opinion (attached to Accused's Opening Brief as ER-1), finding the Accused guilty of violating DR 1-102(A)(4) in one respect. The panel imposed a 45-day suspension.

The Accused timely sought review pursuant to BR 10.3. The record of this proceeding was filed with the State Court Administrator on July 28, 2005. Review in this court is de novo pursuant to ORS 9.536(2) and BR 10.6.

B. Nature of Judgment Sought to be Reviewed.

The Bar's Second Amended Complaint alleges that his representation of Jerry and Phyllis Nutt, the Accused committed several acts of misconduct that prejudiced the administration of justice in violation of DR 1-102(A)(4). Of these several acts of alleged misconduct, the trial panel found that only one violated DR 1-102(A)(4). On that basis, the panel suspended the Accused for 45 days.

C. Statutory Basis for Appellate Jurisdiction.

This matter is now before the Supreme Court pursuant to ORS 9.536(1), BR 10.1, and BR 10.4.

II. RESPONSE TO ACCUSED'S QUESTIONS PRESENTED ON REVIEW

A. Whether the facts and the law support the trial panel's decision regarding the bankruptcy proceedings.

Response: The trial panel correctly concluded that the Accused's conduct in connection with the Nutts' bankruptcy proceedings violated DR 1-102(A)(4).

B. Whether the trial panel decision is defective because it did not consider the clear and convincing standard as required by BR 5.2.

Response: There is clear and convincing evidence that the Accused committed several acts of misconduct that violated DR 1-102(A)(4).

C. Whether or not the matter must be dismissed in accordance with this Oregon State Bar member's Demurrer/Motion to Dismiss incorporated herein by this reference as though fully set forth herein.

Response: This court has already denied the Accused's Demurrer/Motion to Dismiss on September 28, 2005. If this court wants to revisit the arguments set forth in the Accused's Demurrer/Motion to Dismiss, the Bar asks that it refer to the Bar's Response to that pleading,

filed with this court on September 27, 2005. A copy of that Response is attached to this Brief as ER-20, and is incorporated herein by reference.

III. ADDITIONAL QUESTIONS ON REVIEW AND BAR'S POSITION ON THOSE QUESTIONS

A. Whether the Accused violated DR 1-102(A)(4) by engaging in misconduct additional to the single instance found by the trial panel.

Bar's position: The Accused committed several acts of misconduct that violated DR 1-102(A)(4).

B. Whether the Accused's misconduct in this case warrants the 45-day suspension imposed by the panel, or a longer suspension.

Bar's position: The Accused's repeated misconduct warrants a suspension of at least one year.

IV. SUMMARY OF BAR'S ARGUMENT

This case arises out of the Accused's representation of the Nutts, a retired couple who were experiencing difficulties with the installation of their modular home. Although the Nutts' concerns related to delays in the installation and the quality of the contractor's work, the Accused perceived that the Nutts had a case against their mortgage broker (Gensman) and lender (Septem) for failure to disclose certain terms of credit for the Nutts' construction loan. Before the case was filed, the Nutts' contractor

disappeared. The Accused persuaded the Nutts to pursue recovery from the mortgage broker and lender.

Neither Gensman nor Septem had caused the delays or faults in the installation. It was not self-evident how these defendants' alleged failures to make the proper disclosures for the Nutts' short-term construction loan injured the Nutts. Nevertheless, the Accused filed a complaint that claimed – without explaining *why* – that these defendants were liable to the Nutts for hundreds of thousands of dollars in damages.

Over the course of the litigation, defense counsel repeatedly tried to get the Accused to explain and quantify the Nutts' damages, but he refused to do so even when ordered by the court. The defendants' also repeatedly tried to settle the case, but the Accused repeatedly rejected their settlement overtures.

Defense counsel sought to clarify and narrow the Nutts' complaint through Rule 21 and partial summary judgment motions. These motions were successful, and by the trial date – July 1, 1999 – the plaintiffs' case had been whittled down to only one cause, against only one defendant (Gensman), with potential awardable damages of only $200.00.

The Nutts appeared at trial on July 1, 1999, not understanding (because the Accused had not told them) that their case was essentially already lost and that they were at risk of having a judgment imposed against them for statutory attorneys fees. At this point, the Accused began focusing his efforts on attacking the judges who had issued unfavorable rulings, rather than attempting to protect the Nutts on the one issue – attorneys fees – that now most threatened their interests. Without any

legitimate reason, the Accused intentionally failed to appear at the attorney fee hearing on November 4, 1999, at which the court ordered the Nutts to pay over $61,000.00 to the two defendants.

This entirely foreseeable (but – to the Nutts – completely unexpected) attorney fee judgment forced them into bankruptcy. When they were unable to pay defendants' attorneys fees, the primary defendant, Gensman, was forced into bankruptcy as well.

Even then, the Accused did not stop his misguided efforts on the Nutts' case. Although the Nutts were now represented in bankruptcy by another attorney, the Accused file documents and took positions in the bankruptcy case without the Nutts' authorization, and stubbornly persisted even after they demanded that he stop.

The above is just a bare outline of this case. At every point in the litigation, the Accused engaged in wrongful conduct that made the litigation more complicated, protracted, and expensive. The following Statement of Facts sets forth this wrongful conduct in detail. While the Bar is keenly aware that this case risks drowning in its own minutiae, such detail unfortunately is necessary to demonstrate how the Accused's conduct prejudiced the administration of justice.

V. STATEMENT OF FACTS

The Bar rejects the Accused's Statement of Facts in this case as insufficiently detailed, and would substitute the following.

A. Stipulation Re: Evidence.

The Bar and the Accused reached the following stipulation concerning testimony/evidence at the disciplinary hearing:

> "(1) Each side accepts the deposition testimony of all witnesses in lieu of live testimony. That includes depositions in the underlying case of *Nutt v. Gensman and others*, as well as discovery, and perpetuation depositions in the current matter, as well as the transcript of the Appleman interview or deposition, if you will, with each of the Nutts.[1]
>
> (2) Each party accepts the statements in the hearing briefs, the factual statements in the hearing briefs, as accurate representations of what the given witness would say if the witness testified in person.
>
> (3) The panel would consider all non-objectionable exhibits as substantive evidence and will rule on objectionable exhibits. (Tr. 53.)

The following Statement of Facts relies in part on statements from the Bar's Trial Memorandum as to what the Nutts or other witnesses would have said had they testified in person. These statements – per the parties' stipulation – are thus the equivalent of sworn testimony and will be cited as: "___ testimony, p. ___, OSB Trial Memo."

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[1] The admitted depositions included those of Judge Beckman, Steven Berman, the Nutts, and the Accused. (Tr. 45.)

B. The Facts.

In 1997m, Jerry and Phyllis Nutt, a retired couple, sold their home in Aloha, Oregon and purchased a modular home for installation in Hebo, Oregon. The home was sold by American Modular Homes; its installation was to be supervised by Don Olson, an independent salesman associated with American Modular Homes. Olson referred the Nutts to Mark Gensman, a mortgage broker, for construction financing. Gensman met with the Nutts and arranged for a construction loan to purchase and install the modular home. The Nutts signed the loan documents on or about May 16, 1997. The loan's terms required payment within four months (*i.e.*, by October 1, 1997), at which point the Nutts would obtain permanent financing on their completed home. The construction loan also provided that $10,000.00 would be held in escrow to pay potential liens by the installation subcontractors. The lender for the construction loan was Septem, LP, a mortgage company owed by Frank Boresek.

Some of the features of the modular home were not what the Nutts had ordered, and there were delays and defects in the installation, which stalled after Olson stopped working on the project. The construction loan deadline expired and the Nutts sought legal advice from the Accused on October 20, 1997 (Ex. 62.) All they wanted at this time was to complete the installation of their home so that they could obtain permanent financing. (Nutt testimony, p. 2, OSB Trial Memo.) The Accused reviewed their loan documents and informed the Nutts that they had a big case against their mortgage broker (Gensman and his corporation, BRG), as well as their construction lender (Boresek and his mortgage company, Septem). The Nutts told the Accused that they did not want to pay large

sums in attorneys fees; rather, they just wanted to complete their home. (Nutt testimony, p. 2, OSB Trial Memo.)

In November 1997, the Accused met with Olson and representatives of American Modular Homes, who agreed that installation of the home would be completed within ten days. The Accused confirmed this agreement by letter dated November 28, 1997, a letter which also advised Olson of the Nutts' claims for damages (totaling about $14,000.00) arising out of the delays in the installation. (Ex. 64.) Of the total claimed damages, $2,500.00 represented the Accused's hourly rate attorneys fees; the remainder were "consequential damages" for the Nutts' inconvenience.

Olson failed to complete the Nutts' home by the agreed date, and by December 1997, had left Oregon. The Nutts wanted to complete their home, and were concerned that Olson might have converted their $10,000.00 escrow hold-back. The Accused negotiated with Olson's lawyer to release any claim Olson might have to the hold-back (Exs. 65-66.)

The Accused continued to advise the Nutts that Gensman and Septem had committed egregious violations of TILA and various Oregon laws. The Nutts repeatedly told the Accused that they did not want to sue; nevertheless, the Accused convinced them that their lender and mortgage broker had committed such serious violations that the Nutts had a civic duty to litigate. (Nutt testimony, p. 3, OSB Trial Memo.)

On February 4, 1998, the Accused and the Nutts' agreed that he would sue Olson, American Modular Homes, Gensman, BRG, Septem, and Boresek on a contingency fee basis. (Ex. 69.) The Accused drafted a complaint

that alleged seven causes of action against Olson, BRG, Gensman, American Modular Homes, Septem, and Boresek. The complaint alleged that Gensman, BRG, Septem, and Boresek had failed to make certain disclosures relating to the terms of the loan pursuant to the Federal Truth in Lending Act (TILA), the Oregon Lender Law, and the Oregon Unfair Trade Practices Act (UTPA), and that those failures to disclose also constituted fraud. (Ex. 3.) The complaint claimed that the Nutts had been damaged in amounts ranging from $100,000.00 to $500,000.00, and also claimed an unspecified amount of punitive damages; the complaint failed, however, to state *how* defendants' non-disclosures injured the Nutts. (Ex. 3.)

The Accused showed the complaint to the Nutts, who were shocked by how much money it asked to recover. The Accused explained that lawyers always set damages in pleadings high so that they could recover everything to which their clients were entitled. (Nutt testimony, p. 4, OSB Trial Memo.)

The complaint was filed on April 23, 1998 (Ex. 3.) Gensman and BRG were represented by attorneys Steven Berman and John Dunbar of the Ball Janik law firm. Gensman had agreed to indemnify Septem and Boresek, so his lawyers took the lead in the defense. Septem and Boresek were represented by Matthew Patton of the Herschner Hunter law firm. By this time, American Modular Homes was out of business, and Olson was in California.

Before they appeared in the lawsuit, Berman and Dunbar evaluated the Nutts' claim against Gensman and Septem. They concluded that at *most* the Nutts might be entitled to recover a portion of their loan fees (less than

$3,000.00) from Gensman/BRG. They determined that most of the claims against Gensman/BRG lacked substantive merit, were improperly pled, and failed to articulate grounds for recovery. Also, the Accused had not met the statutory requirements for pleading punitive damages. (Berman testimony, p. 4, OSB Trial Memo.)

Before responding on Gensman's behalf, Berman advised the Accused of his involvement (Ex. 70.) The next day, June 3, 1998, Berman wrote to the Accused and asked him to call him to discuss the issues in the case. (Ex. 71.) The Accused did not respond.

Berman wrote to the Accused again on June 15, 1998, addressing the complaint's perceived deficiencies. Nevertheless, Berman told the Accused that Gensman hoped for a speedy resolution of the case and asked the Accused to provide a reasonable assessment of what the Nutts thought they were entitled to recover. (Ex. 72.)

The Accused apparently was offended by the tone of this letter. He responded petulantly on June 17, 1998:

> "I'm sitting here feeling real pouty. I called you and you did not return my call. I am sending a copy of this letter to my clients so they know I am on the ball and you're not.
>
> Now, where were we . . . oh yeah, . . . you wanted to talk about a palatable business solution for this matter. Is that one your clients can swallow?
>
> I am always in a real good frame of mind about discussing settlement after getting like a letter like yours dated June 15, 1998. Lets talk. But where to begin . . . ?" (Ex. 73.)

Upon receiving this letter, Berman tried to contact the Accused by telephone. However, the Accused did not return the call. (Ex. 74.) On June 18, 1998, Berman advised the Accused that because the Accused apparently did not wish to confer about Berman's June 15, 1998 objections, as required by court rules, Berman would file motions to correct the complaint's deficiencies. (Ex. 74.)

On August 11, 1998, Berman finally reached the Accused by telephone and asked for a damage estimate. (Ex. 75.) The Accused promised to provide one within a week, but did not do so. Instead, on August 12, 1998, the Accused notified Berman and Patton that he intended to apply for an order of default against their clients (Ex. 1, p. 169.)

On September 4, 1998, Berman sent the Accused a request for admissions and a request for production of documents. (Exs. 4 and 5.) In the letter that accompanied those discovery requests, Berman again asked the Accused for an estimate of damages and again (for the *third* time),[2] asked for a settlement proposal. (Ex. 78.)

On September 5, 1998, the Nutts sent the Accused a letter that included their estimate of damages. (Ex. 79.) The Nutts identified $4,917.88 in construction-related damages, $6,002.99 in damages they felt were caused by Gensman, and $6,000.00 in attorneys fees. They also asked for $25,000.00 in "consequential damages" from Olson and American Modular Homes, and $65,000.00 in "consequential damages" from Gensman and BRG for "undue stress, frustration, and possible loss of health."

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[2] The second time was by letter dated August 12, 1998. (Ex. 75.)

(Ex. 79.) In fact, the Nutts did not know what consequential damages were, or whether they were entitled to receive them. (Nutt testimony, p. 7 (footnote 2), OSB Trial Memo.)

Despite this new information from the Nutts about damages, the Accused did not respond to Berman's settlement overtures until October 16, 1998 (five weeks later), when he wrote a letter demanding $14,402.99 in "actual damages" and $20,000.00 in "general damages," for a total of $34,402.99. (Ex. 82.)[3] Over half of the "actual damages" identified by the Accused, ($7,500.00) represented attorneys fees. The Accused's October 16, 1998 letter to Berman concluded as follows:

> "Mr. and Mrs. Nutt had their retirement home dream turn into a nightmare. Their plight was compounded by the actions of your clients recounted above. [The Nutts] are prepared to make one attempt to resolving this matter, and only one attempt. *If their demand for settlement is not agreed to within 20 days of the date of this letter then there will be no further negotiations* and the matter will be decided upon by a Multnomah County jury. The Nutts will settle this matter for $20,000.00 general damages plus the sums outlined above for a total of $34,402.99. I look

[3] The Accused's demand letter mentioned that Gensman had filed a Bar complaint (quickly dismissed) against the Accused. That the Accused would mention that fact as part of his demand letter suggests that he had developed a personal animosity against Gensman. (Ex. 82.) The Accused later reitereated this personal grudge against Gensman by including in the Nutts' First Amended Complaint, an allegation that Gensman had violated the UTPA by filing a false Bar complaint against *him*. (Ex. 9, p. 8.)

> forward to hearing from you within the time mentioned. This amount is affixed this low at their request to attempt to resolve the matter now. *A counter-offer will immediately terminate negotiations.*" (Emphasis added.) (Ex. 82.)

The Nutts had no idea that the Accused was presenting this offer on a "one time only, take it or leave it" basis. As of October 16, 1998, the Nutts were interested only in obtaining enough money to complete their home without protracted litigation and associated costs. (Nutt testimony, p. 7, OSB Trial Memo.)

Meanwhile, the Accused failed to respond to Berman's September 4, 1998 request for production, failed to request an extension to respond, and failed to respond to Berman's letters attempting to confer with him. (Ex. 81.) On October 15, 1998, Berman filed a motion to compel production of documents, motion for attorneys fees, and Rule 21 motions to correct the deficiencies in the complaint. (Ex. 1, p. 46-7, 56-126, 127-5.) On October 16, 1998 (*i.e.*, the day *after* Berman filed his motion to compel), the Accused asked the Nutts to respond to the request for production. (Ex. 83.) Argument on Berman's motions were set for November 12, 1998, before Judge Bearden.

Berman served the accused with a second request for production of documents on November 3, 1998 (Ex. 8.) The Accused did not respond to this request, tell the Nutts that he had received it, or ask the Nutts to provide him with the requested documents. (Nutt testimony, p. 8, OSB Trial Memo.)

On November 6, 1998, Berman reminded the Accused (by letter) that the Nutts would be liable for Gensman's attorneys fees should Gensman prevail. (Ex. 86.) When he

received this letter, the Accused told the Nutts that Berman was threatening them with an attorney fee award. Phyllis Nutt, upset by this prospect, told the Accused that she did not want him to get them into anything that would expose them to an attorney fee judgment. The Accused minimized her concerns, telling her that this was an empty threat typically made by lawyers. (Nutt testimony, p. 8, OSB Trial Memo.)

On November 10, 1998 – only two days before argument on Berman's motions – the Accused finally responded to Berman's motion to compel production. His response was supported by an affidavit in which he represented that Phyllis Nutt had recently undergone complex surgery and Jerry Nutt was suffering from a chronic "health situation," conditions that had prevented them from compiling the documents Berman had requested. (Ex. 7.) These representations were not true. Although Jerry Nutt did have some serious health problems, they did not prevent him from responding to requests for production of documents or other information, and the Nutts had already given the Accused most of the documents Berman had requested. (Nutt testimony, pp. 8-9, OSB Trial Memo.) In fact, the accused had not asked them to compile any documents until *after* Berman had filed his motion to compel. (Ex. 83.)

The Accused also waited until November 10, 1998 (again, only two days before oral argument), to respond to Berman's Rule 21 motions. (Ex. 1, p. 19.) On November 12, 1998, Judge Bearden granted Berman's motion to compel and struck from the complaint the Accused allegations of damages under TILA and Oregon Lender Law. Judge Bearden stated:

> "I'll require plaintiff to make more definite and certain . . . [by including] some factual statement as to how plaintiff was injured by the violation . . . I see a Prayer out there, but I have no idea how that links up, where it came from and how their specific . . . " (Ex. 45, p. 9.)

The Accused responded by promising, "I can make that more clear, Your Honor." (Ex. 45, p. 9.) Judge Bearden also struck the accused's claim for punitive damages under UTPA. (Ex. 45, p. 10.)

On November 17, 1998, Berman made his *fourth* settlement overture (Ex. 87), again reminding the Accused that if Gensman prevailed at trial, he would be entitled to recover his attorneys fees. Berman offered to settle the case for $2,000.00 (the equivalent of the loan origination and processing fees the Nutts had paid), and a waiver of Gensman's right to demand attorneys fees. At this point, attorneys fees for Berman's firm were about $8,250.00; attorneys fees for Patton's firm were about $1,100.00. (Exs. 43 and 44.) This settlement offer was thus worth (counting the attorneys fees) $11,350.00.

The Accused rejected Berman's latest offer on November 18, 1998, writing:

> "Your offer to settle for $2,000.00 is late. My clients have authorized me to reject this nuisance offer. There is no counter-offer, nor will there be one. We will not engage in any further negotiations." (Ex. 88.)

The Nutts' depositions were scheduled for the next day, November 19, 1998. Judge Bearden had already ruled orally at this time (although his order formalizing the ruling was not entered until November 23, 1998 – Ex. 1, p.

11), that the Accused had not alleged any facts supporting damage claims of up to $500,000.00. Berman therefore had no idea of why the damage claims were so high. However, the Accused had told Berman that when he filed an amended complaint (as Judge Bearden's order now required him to do), he intended to include allegations that Gensman's conduct had exacerbated Jerry Nutt's medical condition. (Berman deposition, p. 94, per stipulation.) Because of this statement, and also because the Accused had previously claimed Mr. Nutt's medical condition as an excuse for not complying with Berman's discovery request, Berman believed that the Nutts' medical conditions were relevant to the Accused's calculation of damages. (Berman deposition, p. 12., per stipulation.)

At the Nutts' depositions, Berman asked them both about their health. The Accused refused to allow them to answer. (Ex. 1, p. 809, 899-901.) When the depositions were over, the Nutts were upset and embarrassed by what they perceived as the Accused's confrontational style and by his refusal to allow them to answer questions about their medical conditions. (Nutt testimony, p. 11, OSB Trial Memo.) They felt they had nothing to hide; they wanted the court to know how the stress produced by the defendants' actions had exacerbated their medical conditions.

On December 7, 1998, Berman asked the Accused if he was willing to participate in a pretrial settlement conference. (Ex. 90.) The Accused ignored this proposal. The Nutts never knew that a settlement conference was an option for them and would have participated eagerly in such a conference had the Accused suggested it. (Nutt testimony, p., 11, OSB Trial Memo.)

On December 10, 1998, the Accused filed his First Amended Complaint. (Ex. 9.) Berman still considered the allegations inadequate, and planned to file a second set of Rule 21 motions. On December 16, 1998, he attempted to confer with the Accused by writing to him and expressing his concerns that the Accused had not alleged any factual basis for the damage claims under TILA and UTPA. (Ex. 91.) Berman also pointed out that the Accused had not repled the fraud claim as Judge Bearden had ordered. (Ex. 91, p. 2) Finally, Berman observed that the allegation that Gensman had violated UTPA by filing a Bar complaint against the Accused was not appropriate as it related to the *Accused*, not his clients. (Ex. 91, p. 2.) The Accused ignored Berman's December 16, 1998 letter.

On December 18, 1998, Septem and Boresek filed an answer that included a counterclaim for attorneys fees and costs under TILA and the Oregon Lender Law. (Ex. 1, p. 440-43.) This answer exposed the Nutts to liability for any attorneys fees incurred by Septem and Boresek, in addition to any attorneys fees incurred by Gensman and BRG.

Because the Accused did not respond to the second request for production of documents or Berman's December 10, 1998 letter, Berman wrote to the Accused on December 31, 1998, asking for the requested documents and for some indication as to whether the Accused intended to remedy the deficiencies in the First Amended Complaint. (Ex. 92) The Accused did not respond.

1998 came to a close. By this time, the lawsuit had been pending for eight months. Gensman's attorneys fees were mounting, and Berman was making no progress in his attempts to either settle the case or determine factually why the Nutts claimed damages against his clients.

Accordingly, on January 20, 1999, Berman filed a second set of Rule 21 motions raising many of the same objections raised in his previous Rule 21 motions. He also filed a motion for partial summary judgment and for attorneys fees. (Ex. 1, pp. 404-22, 423-33, 434-35, 438-42.) The summary judgment motion contested the Nutts' right to (and the amount of) damages in three of the four claims for relief alleged against Gensman in the First Amended Complaint. (Ex. 10.) Berman supported his Rule 21 and summary judgment motions with evidence, including excerpts from the Nutts' deposition transcripts. (Ex. 1, pp. 246-403.)

The Accused opposed the motions on February 12, 1999. (Ex. 1, pp. 669-91.) He supported the opposition with an affidavit (dated February 18, 1999) from the Nutts (Ex. 14), in which they claimed that they had been "harmed a lot financially" (although they did not specify *how*), and that Gensman's conduct had caused them to suffer "emotional and physical stress that ultimately caused physical ramifications." (Ex. 14, p. 4.)

Berman replied to these opposition documents on February 24, 1999 (Exs. 15 and 16), noting that the Nutts were using their physical condition, about which the accused had refused to allow them to testify at deposition, as a basis for damage claims. (Ex. 15, p. 610.)

The court set trial for July 1, 1999. On March 15, 1999, the Accused served plaintiffs' first request for production of documents on Berman. (Ex. 17.) At this point, the lawsuit had been pending for eleven months, and trial was only four months away. This was the first discovery sought by the Accused from Gensman, and he had not yet sought *any* discovery from Septem.

On April 14, 1999, the Accused wrote Berman and told him that the next day, April 15, 1999, he intended to appear ex parte and move to reinstate the Nutts case against Don Olson dba American Modular Homes. (Ex. 93.) (Olson had been dismissed as a party to the lawsuit because the Accused had failed to serve him with the complaint). (Ex. 93.) Fearing that reinstating Olson might delay the trial, Berman appeared at ex parte to oppose the motion. Seeing Berman there, the Accused decided not to offer his motion. When confronted about the inconvenience he had caused, the Accused told Berman, "I don't care, Steve." (Ex. 94; Berman deposition, p. 119, per stipulation.)

Concerned that the Accused simply wanted to delay the trial, Berman advised the Accused that he would oppose any attempts to do so. (Ex. 94.)

On April 15, 1999, Berman responded to the Accused's request for production of documents. (Ex. 18.) Berman objected to most of the requests as overbroad and unduly burdensome, but offered to produce documents relating to the Nutt transaction subject to a protective order and after the court had ruled on the pending summary judgment motions. (Ex. 18.) When he received Berman's response, the Accused did not take any steps to confer with Berman.

On April 26, 1999, Patton offered to settle on behalf of Septem and Boresek. (Ex. 96.) Patton offered to pay the Nutts $1,000.00 and waive Septem's attorneys fees (which, at that point, were approximately $4,600.00). (Ex. 44.) The Accused did not respond to Patton's letter. On April 27,

1999, the Accused sent Patton a "second"[4] request for production of documents. (Ex. 20.)

Berman's motions for partial summary judgment were argued in five separate appearances before Judge Nely Johnson: March 15, 1999; March 19, 1999; April 21, 1999; June 9, 1999; and June 16, 1999. (Exs. 46, 47, 49, 50, and 51.)

At the first of these hearings (March 15, 1999), Judge Johnson granted Berman's motion on the TILA claim, ruling that TILA did not apply to Gensman and BRG. (Ex. 46, p. 14.)

At the second hearing (March 19, 1999), Judge Johnson granted Berman's motion on the Oregon Lender Law claim, ruling that Gensman had made the proper disclosures to the Nutts about their loan transaction, except possibly as concerned their right to rescind the transaction. (Ex. 47.) This latter issue (right to rescind), had been brought up as an issue by the Accused for the first time at the March 19, 1999 hearing – he had not pled or otherwise alluded to it in the eleven months of litigation. Judge Johnson left that issue open for further argument. (Ex. 47, pp. 102-03.) Judge Johnson also noted that the Accused had failed to plead that the Nutts had incurred any damages under UTPA, and had failed to follow the proper procedures that would allow him to ask for punitive damages. (Ex. 47, p. 81).

The Accused agreed with Judge Johnson that he needed to "rush off and amend my pleadings." (Ex. 47, p.

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[4] This was actually the *first* request for production served on Patton's clients.

85.) He did not do so. In fact, he did not even attempt to file his Second Amended Complaint until the day of trial – July 1, 1999.

After the March 19, 1999 hearing, then, the Accused knew that he could not proceed against Gensman under TILA, that there was only one possibly viable issue remaining under the Oregon Lender Law (right to rescind), that he had not alleged more than $200.00 in damages under UTPA, and that he had not followed the proper procedures for alleging punitive damages.

On April 20, 1999, the Accused took the Nutts to a courthouse for an appearance before Judge Henry Kantor. He sought at this hearing to obtain a judgment against American Modular Homes, which had not appeared in the litigation. (Ex. 48.) The Accused appeared before Judge Kantor without having first obtained a default order from the presiding judge as he was required to do by court rule. (Ex. 48.)[5] Instead, the Accused asked Judge Kantor to sign the order of default. Judge Kantor noted the procedural irregularity, and only reluctantly signed the order, telling the Accused that he did not know whether it was valid. (Ex. 48, p. 25.) Judge Kantor then invited the Accused to present a prima facie case on the issue of damages. The Accused was unable to articulate any basis for his damages requests against American Modular Homes of $250,000.00 for breach of contract, or $500,000.00 for fraud (Ex. 48, pp. 28-31). Instead, he told the court that his client (Mr. Nutt) could "articulate [that issue] a lot

[5] Although the Accused told Judge Kantor that American Modular Homes had been properly served, it was not clear from the record that that was the case – as noted by Judge Kantor at the hearing. (Ex. 48, pp. 20-21.)

better than I can." (Ex. 48, p. 33.) Under oath, Mr. Nutt then testified that he had spent $6,000.00 on repairs and thought he had incurred some additional expenses for plumbing and cabinetry of maybe "5 to 10, $15,000.00." (Ex. 48, pp. 35-36.)

On the limited evidence before him, Judge Kantor offered to sign a judgment against American Modular Homes for $20,000.00. (Ex. 48, p. 37.) Realizing that the Nutts might have additional damages to which they were not prepared to testify that day, the judge also allowed them to submit additional evidence of damages by affidavit. (Ex. 48, pp. 37-38.)

The Accused returned to his office and had Jerry Nutt sign an affidavit that (once again) made only conclusory statements about damages. (Ex. 2.)[6] The Accused submitted the affidavit to the court along with a proposed form of judgment for $700,000.00 "economic damages," plus $14,655.00 in attorneys fees. (Ex. 2.)

Judge Kantor refused to rely on the conclusions about damages stated in Mr. Nutt's affidavit and returned it and the proposed form of judgment to the Accused with a letter (dated April 23, 1999) admonishing him:

> "The affidavit you attached states only conclusions and will not be relied upon me to determine damages." (Ex. 2.)

Meanwhile, at Judge Johnson's *third* hearing on Gensman's summary judgment motions (on April 21,

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[6] For example, the affidavit stated: "As a result of American Modular Homes' unfair trade practice, I have been damaged in the amount of $100,000.00." (Ex. 2, p. 2.)

1999), she ruled that the Accused had not offered sufficient evidence that Gensman had committed fraud and therefore granted summary judgment on that claim. (Ex. 49, p. 105.)

On May 11, 1999, attorney Patton filed a motion for summary judgment, on behalf of Septem and Boresek, arguing that Judge Johnson's prior rulings on TILA, fraud, and Oregon Lender Law claims against Gensman required summary judgment in favor of his clients on these claims. Patton also argued that UTPA did not apply to his clients as lenders of money. (Ex. 1, pp. 1787-92; Ex. 21.)

Although the Nutts' ability to recover at this point was severely constrained (and they were facing a possible attorney fee judgment against them), Gensman's attorney, Dunbar, made a *fifth* settlement overture to the Accused on May 18, 1999. (Ex. 1, p. 1474.) He sought by doing so to avoid the considerable expense of a circuit court trial on a $200.00 claim. (Ex. 1, p. 1474.) He said "Your remaining claims are not strong ones, and the most you can hope to achieve . . . is a few hundred dollars. . . . Your clients are at enormous risk for a sizable fee award. (Ex. 97.) Dunbar offered to pay the Nutts $2,500.00 and a waiver of Gensman's right to collect attorneys fees from them. As of May 18, 1999, Gensman's attorneys fees were approximately $22,413.00. (Ex. 1, p. 1474.) This settlement offer was therefore worth almost $25,000.00. The Accused rejected this offer without advising the Nutts about it. The Nutts did not understand that at this point it was inevitable that they would have to pay some or all of Gensman's attorneys fees. (Nutt testimony, p. 17, OSB Trial Memo.)

On May 24, 1999, Patton responded to the Accused's "second" request for production (Ex. 20), objecting to most of the requests as unduly burdensome and overly broad. Nevertheless, Patton agreed to provide unprivileged documents relating to the Nutt transaction if the court denied Septem's pending motions for summary judgment. (Ex. 1, pp. 712-16.)

The Accused did not confer with Patton (just as he did not confer with Dunbar) about his response; rather, on June 3, 1999 – less than a month before trial– the Accused served Gensman and Septem with motions to compel. (Ex. 1, pp. 704-706, 719-21, or Exs. 28 and 29.) (Note: these motions were not actually filed until June 9, 1999, and Berman – for some reason– did not receive them in the mail until June 10, 1999 – Ex. 99.)

On June 7, 1999, the Accused moved to postpone the July 1, 1999 trial date. (Ex. 27.) The reasons he cited to justify a set over were substantially matters that were within his own control; he had not taken a default judgment against American Modular Homes; summary judgment motions were still pending; a Rule 21 motion was still pending; he had not deposed Gensman and Boresek; there were pending motions to compel production (his own); and he had not yet served Olson. (Ex. 27, p. 1794.) The Accused also moved to have the case designated as a complex litigation. (Ex. 1, p. 1064.)

On June 9, 1999, Presiding Judge Ellis heard oral argument on the Accused's motion to postpone. Berman offered to withdraw Gensman's pending Rule 21 motion if its pendency would delay the trial. At this hearing, Berman learned that the Accused had filed motions to compel production (*i.e.*, the motions that the Accused had served

on June 3, 1999, but that Berman had not yet received), and expressed concern that the Accused had done so without first conferring with him or Dunbar as required by UTCR 5.010. Judge Ellis informed the Accused that because he had not conferred with Berman or Dunbar, his motions to compel were not properly before the court. (Berman deposition, p. 107, per stipulation.) Judge Ellis denied the Accused's motions for a set over and for a complex case designation. (Ex. 1, pp. 949-55, and 1064-65.)

Immediately after the June 9, 1999 hearing before Judge Ellis (clearly seeking to correct the deficiency noted by Judge Ellis), the Accused filed with the court two certificates of compliance (unsupported by affidavit) that misrepresented that he had made a good faith attempt to confer with Berman and Patton regarding his requests for production. (Ex. 31.) In fact, this was untrue; the Accused had not made any attempts to confer with Patton and Berman before filing his motions to compel. (Ex. 1, pp. 949-55; Berman deposition, p. 108, per stipulation.)[7]

After their June 9, 1999 appearance before Judge Ellis, Dunbar and Berman repeatedly offered to confer with the Accused about his discovery requests and invited him to come to their office to do so. (Berman deposition, p. 108, per stipulation.) The Accused declined the offer, but promised to call Berman to confer. The Accused did not keep his promise, nor did he ever confer with Berman about discovery, despite Berman's repeated offers to do so on June 9, 10, and 16, 1999. (Exs. 98-100.)

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[7] The Accused explained at the disciplinary hearing that he had not conferred on this occasion "because of the press of business I don't get to things like that." (Tr. 125-28, November 2, 1999 hearing date.)

Berman voluntarily produced some of the documents Accused had requested on June 16, 1999, less than two weeks before trial. (Ex. 100.)

Also on June 9, 1999, Judge Johnson heard the *fourth* installment of the summary judgment argument and dismissed the Nutts' UTPA and fraud claims against Septem and Boresek. (Ex. 50.) Judge Johnson also allowed Patton to amend Septem and Boresek's answer to include a claim for attorneys fees under TILA and UTPA. (Ex. 50, p. 144.)

After the June 9, 1999 hearings, Berman and Dunbar made a *sixth* settlement overture, which they confirmed by a letter dated June 25, 1999. (Ex. 102.) After pointing out that Judge Johnson had earlier limited the Nutts' case against Gensman to a $200.00 UTPA claim,[8] and that the Nutts' were at risk for a sizable fee award, Berman and Dunbar offered to settle by paying $1,000.00 to the Nutts, plus a waiver of Gensman's right to collect attorneys fees from them. As of June 26, 1999, Gensman's fees were approximately $29,065.00, making this offer worth approximately $30,065.00. (Ex. 1, p. 1499, or Ex. 45.)

At this point, Septem and Boresek were *entitled* to recover some or all of their attorneys fees from the Nutts. The Accused did not advise the Nutts that they would not

[8] Judge Johnson determined that in fact, the lender (Septem), disclosed everything correctly. Even if Gensman had failed earlier to disclose something, his error did not damage the Nutts because Septem made the necessary disclosures before they signed. However, if the mortgage broker (Gensman) had failed to make such disclosures, even if there were no damages, he nevertheless violated the statute and the Nutts would be entitled to recover $200.00 statutory damages. (Ex. 47, p. 86).

have to pay some or all of Septem's attorneys fees, as well as some or all of Gensman's attorneys fees. (Nutt testimony, p. 19, OSB Trial Memo.)

As he had promised Judge Ellis on June 9, 1999, Berman withdrew his Rule 21 motions against the First Amended Complaint on June 14, 1999. (Ex. 32.) Because the Accused had *never* alleged what damages Gensman had caused the Nutts – despite direction from three different judges that he do so – Berman filed another, abbreviated, Rule 21 motion on June 15, 1999, directed primarily at the damages issue. (Ex. 34.) He argued that without a proper allegation of damages, the Nutts' case lacked an essential element; that the Accused had had plenty of time (and notice) to correct that error; and that because he had failed to do so after so many months, the case should be dismissed. (Ex. 34, p. 1075.)

On June 15, 1999, Berman also filed an answer and counter-claim on Gensman's behalf. This pleading alleged prevailing party attorneys fees under the Oregon Lender Law and UTPA. (Ex. 33.)

On June 16, 1999, after the *fifth and final* summary judgment hearing, Judge Johnson found that the Nutts were not entitled to notice of their right to rescind under the Oregon Lender Law. (Ex. 1, pp. 154-56.) This meant that Gensman and Septem had prevailed entirely on the Nutts' Oregon Lender Law claim. As of June 16, 1999, then, *all* claims against Septem had been resolved against the Nutts on summary judgment and were dismissed with prejudice. The *only* claim remaining against Gensman was the $200.00 UTPA claim. Judge Johnson signed a partial

final judgment in favor of Septem on June 16, 1999. (Ex. 1, pp. 1221-22.)[9] Berman submitted a proposed form of summary judgment order to Judge Johnson on June 16, 1999, which she signed on June 29, 1999 – two days before trial. (Ex. 35.)

The Accused, on June 23, 1999, recognized that he was not ready for trial. Accordingly, he asked Berman and Patton to agree to abate the trial because of Jerry Nutt's health. (Ex. 101.) The Nutts had not asked the Accused to postpone the trial date. Although Jerry Nutt's health was poor, he was able and willing to go to trial. By this time, the stress of litigation had become too much for the Nutts, and they wanted it to end. (Nutt testimony, p. 20, OSB Trial Memo.)

Instead of preparing for trial, the Accused advised Judge Johnson by letter dated June 28, 1999 (Ex. 1, p. 1806), that there were issues he felt she had not resolved in summary judgment.

Berman and Patton did not consent to abatement. Consequently, on June 29, 1999 – two days before trial – the Accused filed a motion in presiding court to abate the litigation because of Jerry Nutt's health, something he had known about back in early June 1999 when he made his first request that Judge Ellis postpone the trial date. (Ex. 36.) Judge Ellis denied this motion at a hearing on June 29, 1999 and assigned the case to Judge Douglas Beckman for jury trial the next day. (Ex. 52, p. 7.)

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[9] Without consulting with the Nutts (Nutt testimony, p. 20, OSB Trial Memo), the Accused appealed from this judgment on August 17, 1999. (Ex. 1, pp. 1218-19.)

On June 30, 1999, Dunbar and Berman submitted to Judge Beckman their trial memoranda, proposed jury instructions, proposed verdict form, and motions to exclude any evidence that related to claims that had been dismissed on summary judgment or that were not related to the remaining UTPA claim. (Ex. 1, pp. 989-1046.) The Accused submitted a trial memorandum and requested jury instructions. (Ex. 1, pp. 1318-26, 1337-38.) The Accused filed yet *another* motion to abate the case because of Jerry Nutt's medical condition, and also filed a motion to postpone the trial (claiming it would take five to seven days), a motion for leave to amend the complaint, a motion for an award of punitive damages, a motion to reconsider Judge Johnson's June 29, 1999 order granting Gensman's summary judgment motion, and a proposed Second Amended Complaint.

Not only did this proposed Second Amended Complaint re-plead all of the claims against Gensman, BRG, Septem and Boresek that Judge Johnson had dismissed, it once again failed to plead *how* the Nutts had been damaged by the defendants' conduct. (Ex. 1, pp. 1266-67, 1269, 1272-73, 1286-87, 1303-17, or Exs. 38 through 43.)

The Nutts appeared in court on July 1, 1999, with witnesses, thinking that they were going to try their case to a jury. They were unaware that the only part of their lawsuit that had survived summary judgment was a $200 claim against Gensman. (Nutt testimony, p. 22, OSB Trial Memo.) Before they entered the courtroom, the Accused assured them that they would win easily. When Phyllis Nutt reiterated her concern that attorneys fees might be assessed against them, the Accused assured her that they had nothing to worry about. (Nutt testimony, p. 22, OSB Trial Memo.)

Judge Beckman began the hearing by asking Jerry Nutt how he felt and then denying the Accused's motion to postpone or abate. (Ex. 53, pp. 43-44.) Judge Beckman proceeded to address the Rule 21 motion – *i.e.*, the damages issue. The Accused told Judge Beckman that he had inadvertently left it out of the body of the complaint, although money damages had always been claimed in the prayer. (Ex. 53, pp. 52-53.) Judge Beckman explained to the Accused why his Complaint, First Amended Complaint and Second Amended Complaint did not allege damages:

> "Judge: The way I'm reading your Complaint, even the Second Amended Complaint, is that you got everything in there except [an allegation of how the defendant injured the plaintiffs]. You can't just say someone negligently hit me, therefore you owe me $100,000.00. You have to say, 'as a result of the negligence, I had this injury, for which I seek $100,000.00.' So that – you see what I'm saying?
>
> Mr. Paulson: Yes, I do, your Honor.
>
> Judge: And so I guess my question is even if I allowed the Second Amended Complaint, I'm looking at the third claim for relief. There is nothing that instructs as to – when you allege all these wrongful acts, 'A' through 'J', that they did all these things, threats and intimidation and deceptive – it's just on and on. And then you say plaintiffs request $100,000.00. What – that would be like the defendant's vehicle struck me through his negligence. Therefore, you owe me $100,000.00, without saying that I was injured. You see what I mean?
>
> Mr. Paulson: Yes, I do, but —

> Judge: To state a claim for relief you have to have breach, first a duty of – I don't think there is any question about that, a duty of a breach of that duty, approximate cause, and damages. I mean, those are the – and that makes a claim for relief. If you don't have causation and damages, I don't think just saying they owe me $100,000.00 gets it . . . Frankly, I went through every one of your claims, and there is – you never allege, that I can see, damages. And I just looked at every one of them. You allege wrongful conduct under various theories, and then just say they owe me – I think it was $100,000.00, $250,000.00, $500,000.00. But there's never any statement as to what it is you're claiming that they should be paying for." (Ex. 53, pp. 54-57.)

Even with this explanation, and given the opportunity to do so in open court – on the day of trial – the Accused was still unable to articulate his theory of damages. (Ex. 53, pp. 53-65.) Judge Beckman thereupon granted the Rule 21 motions and dismissed the claims against Gensman and BRG. Judge Beckman declined to reconsider any of Judge Johnson's summary judgment rulings and ordered that the $10,000.00 escrow hold-back – which was all that the Nutts had wanted to begin with – be returned to the Nutts. With that, the Nutts "jury trial" was over. (Ex. 53.)

The Nutts understood at this point that the Accused had not produced enough evidence to support the claims in their pleadings. The hearing before Judge Beckman lasted about twenty minutes. Afterwards, they found themselves on the courtroom steps, stunned to have lost the case and to be facing liability for the defendants' attorneys fees. The Accused told them that there was nothing he could do to

help them and, without explaining what had happened to their case, simply walked away. (Nutt testimony, p. 22, OSB Trial Memo.)

On July 16, 1999, Judge Johnson signed a partial final judgment against the Nutts, in favor of Septem and Boresek. (Ex. 1, pp. 1225-26.) This judgment entitled these defendants to petition the court for an award of prevailing party fees and attorneys fees against the Nutts. On July 20, 1999, Dunbar submitted a proposed judgment, to which the Accused objected, claiming that Judge Johnson had not decided all the issues in the case on summary judgment, that the court should reconsider all of its rulings, that he should be given leave to file a Second Amended Complaint, and that the case should be returned to Judge Johnson for further consideration of summary judgment. (Ex. 1, pp. 22, 48-52.)

Judge Beckman set a hearing for entry of a final judgment in favor of Gensman for August 23, 1999. (Ex. 54.) At the hearing, the Accused argued that the Nutts had been treated unfairly and he accused Judge Beckman of conspiring with Judge Ellis to deny the Nutts a full and fair hearing. (Ex. 54, p. 1913.)

After the August 23, 1999 hearing, Judge Beckman signed an order denying all of the motions the Accused had filed the day before trial. He also dismissed, with prejudice, all of the claims alleged in the Accused's First Amended Complaint, and released to the Nutts the $10,000.00 escrow hold-back that they had originally sought to pay for the completion of their home. (Ex. 1, pp. 1179-80.) Judge Beckman also signed a partial final judgment against the Nutts awarding Gensman and BRG their attorneys fees and costs. (Ex. 1, pp. 1176-78.)

The next step was to determine how much the Nutts owed in attorneys fees and costs. On July 28, 1999, Patton had submitted his statement for attorneys fees and costs, claiming the total sum of $10,707.00. (Ex. 43.) Patton also asked for an enhanced prevailing party fee of up to $5,000.00 because of the Accused's misconduct in the case. (Ex. 43.)[10] On September 7, 1999, Dunbar filed his statement for attorneys fees and costs, claiming $42,292.55. (Ex. 44.) Like Patton, Dunbar also asked for an enhanced prevailing party fee of up to $5,000.00.

On September 2, 1999, the Accused filed a motion for a new trial. (Ex. 1, pp. 1546-67.) In it, he claimed that Judge Ellis had abused his discretion by refusing to postpone the July 1, 1999 trial date; that Judge Beckman had abused his discretion by insisting that the case be resolved on July 1, 1999, by declining to re-examine Judge Johnson's summary judgment rulings, and by refusing to allow the Accused to amend the complaint; that Dunbar and Berman had engaged in "judge shopping;" that Berman had made misrepresentations to the court; that there were various irregularities in court orders in the case; and that some of the documents in the court file had been misplaced.

Judge Beckman denied the Accused's motion for a new trial on September 20, 1999, and notified the parties that the defendants' attorneys fees petitions would be heard on October 13, 1999. (Ex. 1, p. 1951.) The Accused filed

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[10] Patton asserted that the case had become more expensive because of the Accused's refusal to specify damages, refusal to discuss settlement, and filing of numerous unnecessary motions designed to drag out the case as long as possible. (Ex. 43.)

written objection to Patton's fee petition, but never one to Berman and Dunbar's. (Ex. 1, pp. 1436-37.)

The hearing on attorneys fees was reset to November 4, 1999, a date that was selected in part to accommodate the Accused's vacation, which the Accused had told the court (and opposing counsel) would begin on November 6, 1999. (Ex. 106.) During the course of the communications about scheduling the hearing, the Accused advised Judge Beckman that he would be complaining to the Commission on Judicial Fitness regarding the judge's conduct in the Nutt case. (Ex. 109.)

Ostensibly to prepare objections to the defendants' attorneys fees petitions, the Accused subpoenaed the Ball Janik firm and Herschner Hunter firm's time and billing records (Ex. 1, pp. 1988-89), even though defendants had already provided these documents as attachments to their fee petitions. (Exs. 43 and 44.) When Dunbar and Patton refused to provide duplicate copies of these documents, the Accused threatened them with a contempt proceeding. (Ex. 1, pp. 1992-93, 1995.)

After July 1, 1999, the Nutts were extremely upset with the Accused and met with him only once. (Nutt testimony, p. 25, OSB Trial Memo.) The Accused told them that there were some post-trial matters that he needed to handle, but that they did not need to attend the proceedings. Although the Nutts had seen the attorneys fees petitions, the Accused did not tell them when they would be heard, or that the judge might be persuaded to reduce the amount of the requested fees. (Nutt testimony, p. 25, OSB Trial Memo.) Unknown to the Nutts, the Accused took no steps whatsoever to reduce the Nutts' liability to Gensman and Septem. He did not appear at the attorneys

fees hearing, even though it had been scheduled to accommodate his vacation schedule. (Ex. 55.)

The Accused testified at the disciplinary hearing that he had did not go to the attorneys fees hearing because he was busy with other matters that day and was about to leave on vacation. (Tr. 157). At his deposition, however, the Accused told another story – *i.e.*, that he had not attended the hearing because "he [Judge Beckman] was biased against me and my clients . . . he wasn't going to listen to anything I had to say on any issue." (Paulson deposition, p. 178, per stipulation.)

On November 4, 1999, Judge Beckman awarded defendants the full amount of their claimed fees, plus $10,000.00 in enhanced prevailing party fees, for a total of $61,561.63. (Ex. 55, p. 10.)

The case was over, but the Accused refused to quit.

On September 23, 1999, without the Nutts' knowledge, the Accused had filed a notice of appeal from Judge Beckman's August 23, 1999 judgment. (Ex. 1, p. 1428.) On November 3, 1999, again without consulting the Nutts (and contrary to their wishes that the matter end – *see* Nutt testimony, p. 25, OSB Trial Memo), the Accused filed a motion to stay the circuit court proceedings pending the filing of a petition for writ of mandamus in the Supreme Court and a motion to change the venue of the circuit court proceedings. (Ex. 1, pp. 1711-19; 1692-1710; 2000-03; and 2006-08.) In support of these actions, the Accused alleged various acts of misconduct by Judge Ellis, Judge Beckman, and Steve Berman. He also alleged that the judges were prejudiced against the Nutts. This court denied the Accused's writ of mandamus petition, and he promptly moved for reconsideration. (Ex. 1, pp. 1684-91.)

Not satisfied with the Supreme Court's consideration of his various petitions, the Accused demanded that the State Court Administrator inform him of the names of the justices who had participated in considering his petitions. He later demanded that the Chief Justice inform him which justices had participated in the decision to deny his writ of mandamus petition and which justices had read all of his submissions and exhibits in their entirety. (Exs. 115-16.)

On December 3, 1999, Judge Beckman signed the final judgment awarding attorneys fees and an order denying the Accused's motion for change of venue and to stay the circuit court proceedings. (Ex. 1, pp. 1616-17; 2256-57.) On December 7, 1999, the Accused filed motions to disqualify Judge Beckman and to stay enforcement of the December 3, 1999 judgment. (Ex. 1, pp. 2186-92.)

The first time the Nutts heard from the Accused after their "trial" was when the Accused advised them (in a December 10, 1999 letter – Ex. 114), that they needed to post a bond for their appeal in order to "maintain our settlement leverage."

On December 13, 1999, Patton began his efforts to collect Septem's attorney fee judgment against the Nutts. (Ex. 1, p. 2124.) Four days later, Dunbar began similar collection efforts. (Ex. 1, p. 2117.)

On December 28, 1999, the Accused – having persuaded the Nutts that they had to proceed with the appeal in order to avoid or postpone having to pay the attorney fee judgments against them (Nutt testimony, p. 26, OSB Trial Memo) – filed a cost bond on appeal and an undertaking signed by the Nutts that they would pay the judgments against them if they did not prevail on appeal. (Ex.

1, pp. 2136-41.) The documents were insufficient under the statutes regulating appeals, and Patton and Dunbar objected to them. (Ex. 1, pp. 2086-91.)

Judge Beckman heard argument on the sufficiency of the Nutts' appeal bond and supercedes undertaking on January 25, 2000. He ruled that the Accused's submissions were null and void, and were insufficient to prevent Patton and Dunbar from executing on their clients' judgments. (Ex. 1, pp. 2356-58.) This hearing was notable for the Accused's extreme discourtesy to the court. The Accused refused to stand and his conduct was disrespectful and rude throughout. He kept talking over Judge Beckman, who characterized his behavior as "extremely bizarre . . . [and] threatening." (Beckman deposition, pp. 35, 43-44, per stipulation.) The transcript of the hearing gives a flavor of the Accused's disrespectful manner:

> "Mr. Paulson: Can this court be fair to this plaintiff and me?
>
> Judge Beckman: You don't get it. I'm not here to answer your questions, Mr. Paulson. I'm the judge, you're the lawyer. . . . You're not acting like a lawyer, you're acting like a jerk." (Ex. 141A.)

On January 25, 2000, pursuant to Judge Beckman's ruling, Patton garnished the Nutts' bank accounts. Dunbar garnished their accounts on January 28, 2000. (Ex. 1, pp. 2313, 2316, 2364, and 2335.) As a result, the Nutts discovered one day that they had no money. They could not afford to pay the judgments against them and needed access to their bank accounts. The Nutts were humiliated that they were forced to consider a suggestion the Accused

had made shortly after trial – *i.e.*, that they file bankruptcy. (Nutt testimony, p. 27, OSB Trial Memo.)

The Nutts retained attorney Cary Gluesenkamp to represent them in their bankruptcy. He filed their bankruptcy petition on February 25, 2000, and promptly notified the Ball Janik firm. (Ex. 1, pp. 2279-80.) The Accused did *not* represent the Nutts in their bankruptcy; by the time they retained Gluesenkamp, they wanted nothing more to do with the Accused. (Nutt testimony, p. 27, OSB Trial Memo.)

The pending appeal of the Nutts' case against Gensman, et al., was an asset of the bankruptcy estate. In April 2000, the Nutts' bankruptcy trustee, Kenneth Eiler, asked Berman if he would be interested in settling the appeal. (Ex. 119.) Because the Accused was still attorney of record on the appeal, Eiler contacted him and advised him that he (Eiler) was considering settlement. Eiler also advised the Accused that the bankruptcy estate did not have the funds to pursue the appeal. (Ex. 119.) The Accused responded by offering to pursue the appeal on a contingency fee basis (Ex. 120), an offer that ignored the Nutts' wishes that the matter end. (Ex. 121.)

At the first meeting of creditors, the Nutts told Eiler that they did not wish to pursue the appeal. (Ex. 121.) Accordingly, Eiler decided to accept Berman's offer of $2,000.00 to settle the appeal and so notified the Accused. (Ex. 121.) Eiler suggested that the Accused review the matter with the Nutts and Gluesenkamp. (Ex. 121.) The Accused did not follow Eiler's suggestion, however; rather, on June 26, 2000, he unilaterally filed an objection (in the bankruptcy action) to Berman's settlement proposal. (Ex. 125.) In that objection, the Accused identified himself as

the attorney for the "debtors" (*i.e.*, the Nutts), even though he did not represent them in the bankruptcy. (Ex. 123.)

When Gluesenkamp learned from Dunbar of the Accused's objection (Ex. 126), he tried to speak with the Accused about it, but the Accused would not return his calls. (Ex. 127.) Accordingly, on July 20, 2000, Gluesenkamp wrote to the Accused and informed him that the Nutts were "very adamant" that they did not want to object to the proposed settlement, that the Accused's objection was filed without their knowledge or consent, that he (Gluesenkamp) was the Nutts' attorney of record in the bankruptcy proceeding, and that the Accused should "promptly withdraw *your* objection." (Ex. 127 – emphasis in the original.)

The Accused did not comply with Gluesenkamp's (or the Nutts') instructions, but unilaterally continued to fight. On July 27, 2000, Dunbar responded to the Accused's objections, pointing out that he lacked authority to make them. (Ex. 128, p. 3.) On July 31, 2000, the Accused – in complete disregard of the Nutts' written instructions (Ex. 128, p. 3.) On July 31, 2000, the Accused – in complete disregard of the Nutts' written instructions (Ex. 127), filed a "Memorandum" with the bankruptcy court, asking that it revisit the state court's judgments against the Nutts because of "irregularities." (Ex. 129.)[11] The Accused also wrote to Gluesenkamp requesting a conference call with him and the Nutts. (Ex. 130.) At this telephone conference on August 2, 2000, the Nutts informed the

[11] This memorandum did not specify why or how the Accused thought the bankruptcy court would have jurisdiction to second guess the state court's decisions and orders.

Accused point blank that they did not want him to proceed further. (Ex. 131.) To reiterate their desire that he immediately end any and all activity related to their case, they wrote him a letter on August 5, 2000, in which they stated: "We do not wish to continue any objection to the discharge of our bankruptcy. We request you . . . take the steps required to close out and remove us from any further involvement related to this case." (Ex. 131.)

The Accused did not respond to the Nutts' unambiguous request. Two weeks later, on August 17, 2000, Gluesenkamp wrote the Accused to tell him that the Nutts still "anxiously await[ed]" his withdrawal of his objection to the proposed settlement. Gluesenkamp insisted that the Accused do so promptly. (Ex. 132.)

The Accused did not respond promptly. In fact, he waited until August 29, 2000, before finally withdrawing his objection to the settlement. (Ex. 133.) Even so, he did not comply with the Nutts' request that he immediately cease activity in the underlying litigation. Instead, he informed Gluesenkamp (on September 28, 2000), that he would withdraw from the litigation "at the appropriate point." (Ex. 134.) Months later, the Accused still had not withdrawn and on December 21, 2000, he wrote the Nutts a letter (Ex. 135) purporting to explain the ongoing status of the case. On June 11, 2001, the Nutts – clearly concerned by the Accused's refusal to withdraw – wrote to Judge Marcus, stating:

> "We do not understand what Mr. Paulson is doing in that [our underlying] case was dismissed, a bankruptcy that we filed as a result of the decision on that case has been discharged, and an appeal request that Mr. Paulson made was dismissed. We have been asking if all of this action

> has been completed and we can finally put it all behind us. Now we have received a copy of a correspondence from you to Mr. Paulson and his correspondence to us saying that this fiasco is still not closed. . . . Phyllis and I sincerely want to move on and put all of this behind us." (Ex. 136.)

The Nutts were not the only victims of the Accused's misuse of the legal system. When the Nutts bankrupted Gensman's and Septem's attorneys fees judgments, the burden of paying the defense lawyers fell onto Gensman, whom the court had relieved of all liability in connection with the Nutt transaction. Gensman, who had already paid the Ball Janik firm over $10,000.00 to defend him against this meritless lawsuit,[12] was forced to declare bankruptcy; the Ball Janik firm was left largely unpaid. (Berman deposition, p. 85, per stipulation.)

VI. ARGUMENT

There is clear and convincing evidence that the Accused engaged in several acts of misconduct that, particularly when considered together, violated DR 1-102(A)(4) (Response to Accused's Questions on Review A through C; Bar's Additional Question on Review A)

DR 1-102(A)(4) provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.

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[12] Gensman was also responsible for Patton's fees under an indemnity agreement with Septem and Boresek. When the attorneys fees became his obligation, Gensman was also forced to file for bankruptcy. (Ex. 140, public portion of LPRC report, p. 9).

A. The elements of DR 1-102(A)(4).

This court held in *In re Haws*, 310 Or 741, 746-48, 801 P2d 818 (1990), that to establish a violation of DR 1-102(A)(4), the Bar must show (1) that the accused lawyer's action or inaction was improper; (2) that the accused lawyer's conduct occurred during the course of a judicial proceeding or proceeding with trappings of a judicial proceeding; and (3) that the accused lawyer's conduct had or could have had a prejudicial effect on the administration of justice.

The concept of "administration of justice" includes both procedural functioning of the case and/or the substantive interests of the parties. (*Haws, supra*, at 310 Or 747.) "Prejudice" may consist of several acts that cause *some* harm or a single act that causes *substantial* harm to the administration of justice. (*Id.* at 748.)

The focus of DR 1-102(A)(4) is on the effect of a lawyer's misconduct on the administration of justice, rather than on a lawyer's state of mind when he committed the misconduct. Accordingly, DR 1-102(A)(4) has no intent requirement. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996). To establish a violation of DR 1-102(A)(4), the Bar need not show that the accused lawyer intended to prejudice the administration of justice, but simply that the lawyer did something improperly (or failed to do something he should have done) and that his act or omission actually or potentially prejudiced the administration of justice. Actual harm from the lawyer's conduct need not be shown; potential harm created by the lawyer's conduct is sufficient to establish a violation. *In re Thompson*, 325 Or 467, 940 P2d 512 (1997).

B. The Bar's allegations.

The Bar's Second Amended Complaint alleged that the Accused violated DR 1-102(A)(4) by engaging in several wrongful acts or omissions in connection with his representation of the Nutts. These acts included: the Accused's stubborn refusal – over the course of more than a year and despite instructions by four judges (Bearden, Johnson, Kantor, and Beckman) – to allege a factual basis for the Nutt's damages claims; the Accused's repeated refusal to discuss settlement with defense counsel; the Accused's repeated refusal to confer with defense counsel before filing motions to compel discovery; the Accused's refusal to allow the Nutts to answer questions about their medical condition, an issue which the Accused himself had introduced into the case; the Accused's disrespectful conduct to Judge Beckman in violation of Uniform Trial Court Rules (UTCR); the Accused's intentional failure to attend the attorneys' fees hearing without justification; and the Accused's refusal to desist acting in the Nutts' case, despite their instruction that he do so.

C. The Trial Panel's Opinion.

The trial panel agreed that the Accused had violated DR 1-102(A)(4), but only with respect to the Accused's continuing to object in the Nutts' bankruptcy, contrary to their instructions.

The panel found that the Accused's objections were clearly improper and harmed the legal proceeding. The panel found:

> "It is improper for a lawyer to file court papers knowing or failing to recognize that the lawyer lacks standing to do so because he is not counsel

> of record for the client on whose behalf he purports to make the filing. Such filings are an impediment to the orderly operation of the court and present an undue burden on the judicial system.
>
> What makes Paulson's actions in the bankruptcy case especially egregious was the second filing he submitted after he had been told both by the Nutts and their bankruptcy lawyer that the Nutts did not acquiesce in the objections and they should be withdrawn. To make matters worse, it took Paulson more than a month from the time he was told his objections were unwelcome to file a motion seeking their withdrawal. In these respects, we have a lawyer's knowing, improper actions risking prejudice to a clients' substantive interests and burdening the court system."

The trial panel found that this one instance of misconduct constituted conduct prejudicial to the administration of justice, and in itself was sufficiently serious to warrant a 45-day suspension. As to the Bar's remaining allegations of misconduct, the panel did not find that the acts or omissions on which they were based were clearly improper or that they resulted in harm, actual or potential, to the administration of justice.

D. The trial panel correctly found that the Accused violated DR 1-102(A)(4); however, the panel erred in limiting their finding to only one act of misconduct.

Contrary to the trial panel's finding, the Accused engaged in several improper acts that caused substantial actual harm to the administration of justice.

1. Wrongful act or omission.

As outlined above, to establish the first element of DR 1-102(A)(4), the Bar must prove that the Accused engaged in "conduct" that was improper – that is, the Accused did something he should not have done, or failed to do something he should have done. *See In re Gustafson*, 327 Or 636, 643, 968 P2d 367 (1998). Stated another way, the question is whether the Accused acted contrary to a duty, or failed to act in accordance with a duty, that applied to him under the circumstances.

In this case, the Accused repeatedly engaged in conduct contrary to duties established by court rule or case law. Specifically:

ORCP 17(C)(4) provides that when a lawyer signs a pleading or other paper submitted to the court, he or she certifies that the allegations and other factual assertions in the pleading or other paper are supported by evidence. By signing the Complaint and the First Amended Complaint in the Nutts' action, the Accused certified that there was evidence to support the Nutts' damage claims, which ranged from $100,000.00 to $500,000.00. However, these alleged damages far exceeded any reasonable calculation of the Nutts' actual damages. Despite several opportunities, neither the Accused nor the Nutts were *ever* able to articulate any theory of damages that came close to justifying even the smallest figure of damages ($100,000.00) demanded by their pleadings.

It is worth noting (although not part of this disciplinary case per se) that the Accused's inability/refusal to identify the Nutts' damages continued into this disciplinary matter. At his deposition on June 21, 2004, the Accused was asked about damages:

"Bar Counsel: So tell me what it was in terms of consequential damages that you were seeking on behalf of the Nutts against the mortgage broker and the lender.

The Accused: I don't understand the question.

Bar Counsel: What was the nature of the consequential damages that you were seeking on behalf of the Nutts against the mortgage broker and the lender?

The Accused: I don't recall.

Bar Counsel: So you don't know – you can't tell me anything about the nature of the consequential damages that you were seeking against the mortgage broker and the lenders on behalf of the Nutts?

The Accused: I don't understand the question.

Bar Counsel: What don't you understand?

The Accused: I don't understand what it is you're asking."

ORCP 21E and case law prohibit a lawyer from filing sham pleadings, *i.e.*, pleadings that are false in fact. *Andrysek v. Andrysek*, 280 Or 61, 569 P2d 615 (1977). The Accused's claims of damages in the complaints he filed on behalf of the Nutts were false in fact, something recognized by every judge who looked at them.

ORCP 21E and case law also prohibit the filing of frivolous pleadings. *Andrysek v. Andrysek, supra.* The Accused did not make substantive changes to his allegations of damages in the original and First Amended Complaints as he was ordered to do by Judge Bearden's rulings on the motions to strike the Complaint. The

subsequent pleadings were thus frivolous and again subject to motions to strike or dismiss. *Goose Hollow v. City of Portland*, 58 Or App 722, 726 N 4, 650 P2d 135 (1982).

Former ORS 18.535(1) (renumbered in 2003 as ORS 31.725(1)) prohibited lawyers in civil actions from requesting punitive damages in their original pleadings. Subsequent pleadings could include such a claim if allowed by the court after an evidentiary showing. The Accused drafted, signed and filed an original complaint that included a request for punitive damages contrary to the provisions of former ORS 18.535(1) (current ORS 31.725(1)).

Multnomah County Local Rule 6.012(1) imposes on the parties to civil litigation the obligation to make reasonable settlement efforts. Even though Gensman's lawyers made numerous attempts to discuss settlement, all but one of their offers were rejected without a counter-offer or ignored by the Accused, altogether, to the Nutts' substantial detriment. Berman tried to arrange a settlement conference, but his efforts to do so were rebuffed. The Accused's only participation in settlement discussions was one "take it or leave it" offer set so high that Gensman was sure to reject it.

UTCR 3.050(1) required the Accused to stand while addressing the court. The Accused violated this rule in an appearance before Judge Beckman, an appearance also notable for other examples of extreme discourtesy by the Accused toward the court.

ORCP 39D permits a lawyer to instruct a deponent not to answer a question propounded in a deposition under *only* three circumstances, one of which is to preserve a privilege. The Accused violated his duty not to interfere

with Gensman's efforts to obtain reasonable discovery when he instructed the Nutts not to answer questions about their medical conditions, even though the Accused had already waived any claim of privilege by putting those conditions at issue.

UTCR 5.010 imposed upon the Accused a duty to confer before filing his motions to compel production against Septem and Gensman. The Accused did not confer on these, his own motions, and refused to confer on many defense motions. Also, when told by Judge Ellis that the court would not consider his motions to compel because of his failure to confer, the Accused promptly filed certificates of compliance that represented falsely that he *had* conferred. (Ex. 31.) The Accused admitted at the disciplinary hearing that he had not in fact conferred on this occasion. (*See* Tr. 125-27 – November 2, 1999 hearing date.)

Further guidance on the types of wrongful acts/omissions that violate DR 1-102(A)(4) is provided by Oregon disciplinary case law.

Disrespectful conduct toward the court. In *In re Rochat*, 295 Or 533, 668 P2d 376 (1983), the lawyer harassed and was disrespectful to court staff. In *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), the lawyer personally confronted an appellate judge over an adverse ruling, causing the judge to feel threatened. Similarly, in this case, the Accused was disrespectful to Judge Beckman, refusing to stand in court and berating Judge Beckman for his handling of the case. Judge Beckman described the Accused's manner as angry and threatening. The Accused also threatened to and did file meritless complaints to the Commission on Judicial Fitness against Judges Beckman

and Ellis. (Ex. 139.) After this court denied his mandamus petitions, the Accused acted disrespectfully toward this court, demanding to know if the Justices had even read his submissions before rendering their decision. (Exs. 115 and 116.)

Actions taken by attorney without client authority. In *In re Paauwe*, 294 Or 171, 654 P2d 1117 (1982), the lawyer filed a meritless appeal without his clients' consent. Here, the Accused appealed the Nutts' case without their knowledge or prior consent. He then continued to pursue the appeal despite the Nutts' explicit instructions that he not do so and their reiterations that they wished to have nothing further to do with the litigation. The Accused also objected to the bankruptcy trustee's proposed settlement with Dunbar without the Nutts' knowledge or consent and continued to press his objection even after the Nutts demanded that he withdraw it. The Accused eventually complied with their instructions, but only months later and *after* opposing counsel was forced to respond.

Misrepresentations to the court. In *In re Boucier*, 322 Or 561, 909 P2d 1234 (1996), an attorney's misrepresentation to the court that he had consulted with opposing party before filing a motion to dismiss appeal was held to be a single act that substantially harmed the administration of justice. Similarly, the Accused failed to confer with Berman and Patton before filing motions to compel production. When confronted by Judge Ellis, the Accused filed certificates of compliance that misrepresented that he had conferred. This alone violated DR 1-102(A)(4).

Unnecessary litigation/improper motivation for litigation. The lawyers in *In re White*, 311 Or 573, 815 P2d 1257 (1991) and *In re Stauffer*, 327 Or 44, 956 P2d

967 (1998), similarly filed and pursued numerous, duplicative and frivolous claims against targeted defendants. In *Stauffer*, this court found that a lawyer who had engendered "a staggering amount of unnecessary litigation [in a case] which should have been closed promptly" violated DR 1-102(A)(4). (*Stauffer*, *supra*, 327 Or at 61.) Here, rather than pursuing the modest goals expressed to him by his clients, the Accused escalated their case into a litigation nightmare. The Accused did everything he could to keep a meritless case alive against defendants who had caused the Nutts *no* damages. He asserted damages claims that were not properly pled or supported by evidence. He continued to file virtually identical amended complaints, despite instruction from three judges about what he needed to do to correct them, and despite an order striking his damage claims. He ultimately went to trial on a case in which he had never articulated damages and even then made no attempt to do so. The Accused objected to every form of order presented to the court by the defendants, even the orders resulting from the November 4, 1999 attorney fee hearing at which he had not appeared. He also filed motions to abate and postpone the trial three times on the same grounds.

Failure to make required appearance. In *In re Dixson*, 305 Or 83, 750 P2d 157 (1988), the lawyer failed to appear at a scheduled deposition. Here, the Accused failed – apparently for no other reason than pique at Judge Beckman – to appear at the November 4, 1999 attorney fees hearing. He thereby failed even to attempt to protect the Nutts' in the one matter that most threatened their interests – the attorneys' fees issue – with horrifying yet predictable results: the court granted judgment in the full

amount of the defendants' requests and awarded an additional $10,000.00 in penalties against the Nutts.

2. Harm to the administration of justice.

This is the second element the bar must prove to establish a DR 1-102(A)(4) violation. Substantial harm resulted from the Accused's conduct to virtually everyone involved in this litigation. The opposing parties incurred thousands of dollars in fees defending themselves against meritless claims. Gensman filed for bankruptcy protection and his lawyers went largely unpaid. The court system was burdened with the Accused's numerous filings and disrespectful behavior, to the point where it assessed enhanced prevailing party fees. Most significantly however, the Nutts – who had initially consulted the Accused with a modest request for assistance in the completion of their Hebo retirement home – were driven into bankruptcy by the fees awarded against them because of the Accused's conduct.

In sum, the Accused engaged in a pattern of conduct that had the potential to harm, and in fact did harm, the substantive interests of his own clients and the functioning of the judicial system. He thereby violated DR 1-102(A)(4).

VII. SANCTION

The 45-days imposed by the trial panel is insufficient given the many instances of improper conduct by the Accused and the actual harm that he caused. The Accused should be suspended for at least one year (Bar's Additional Question on Review B)

This court refers to the ABA *Standards for Imposing Lawyer Sanctions ("Standards")*, in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct.

A. ABA Standards.

The *Standards* establish an analytical framework for determining the appropriate sanction in disciplinary cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, the court makes a preliminary determination of sanctions, after which it adjusts the sanction, if appropriate, based on the existence of aggravating or mitigating circumstances.

1. Duty Violated.

In this case, the Accused violated his duty under *Standards* § 6.2[13] to refrain from abusing the legal process. *Standards* § 6.2 relates to "cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

2. Mental state.

The ABA *Standards* defined the mental state of "intent" as the conscious objective or purpose to accomplish a

[13] The trial panel inaccurately listed the appropriate section of the Standards as § 6.1, which relates to false statement, fraud and misrepresentation. However, it is clear from context that the trial panel meant to refer to *Standards* § 6.2.

particular result, and further define the mental state of "knowledge" as the conscious awareness of the nature and attendant circumstances of the conduct, but without the conscious objective or purpose to accomplish a particular result. *Standards* at 7.

While not addressing the issue of mental state at length, the trial panel analyzed the Accused's misconduct under the "knowing" standard.

The Bar concurs that the Accused acted *at least* knowingly, and at times intentionally. The Accused knew that the damage claims he asserted on behalf of the Nutts did not allege any factual foundation. This deficiency was repeatedly pointed out to him by the court, but the Accused steadfastly refused to amend the Nutts' complaint to include such a factual foundation – presumably because he did not have one. Also, the Accused knew that he was required by court rules to confer with opposing counsel, but he continually failed or refused to do so. On one occasion, after Judge Ellis told him that his motions to compel were not properly before the court until he conferred with opposing counsel, the Accused filed Certificates of Compliance that misrepresented that he had complied. Such conduct suggests an intentional mental state.

The Accused's refusal to cooperate with the discovery and settlement negotiation process also suggests that his conduct was at least knowing, as was the disrespect he exhibited toward Judge Beckman. The Accused knew of the Nutts' expressed wishes to avoid expensive litigation and exposure to fees and costs, yet he knowingly acted in a manner inconsistent with those wishes.

Finally, the Accused acted at least knowingly when he interceded in the Nutts' bankruptcy proceeding without their consent or authority, and also when he persisted in objecting to the bankruptcy settlement despite their instructions to desist.

3. Actual or potential injury.

For purposes of disciplinary sanction analysis, both actual and potential injury are taken into account. *See In re Williams*, 314 Or 530, 840 P2d 1280 (1992). The trial panel recognized that there was significant actual injury in this case, both to the Nutts' and the court system.

In fact, the damage was even more significant than that specifically noted by the panel. The named defendants in *Nutt v. Gensman* incurred tens of thousands of dollars in attorneys fees defending claims that were ultimately found to have no merit as a matter of law. At least a portion of those fees (*i.e.*, the $10,000.00 assessed as enhanced prevailing party fees) was attributable directly to the Accused's misconduct.

The Nutts had purchased their Hebo home doubtless with the hope of a happy retirement. Instead, the Accused's mishandling of their case forced them into bankruptcy. When they discharged their obligation to pay the Ball Janik firm fees, Gensman was left obligated to pay his own fees and (because of the indemnity agreement) those of the other defendants. Gensman too was thus forced into bankruptcy, leaving the Ball Janik firm largely unpaid. These financial disasters were caused entirely by the Accused's stubborn pursuit of a case for which he would not (and the Bar submits *could* not) articulate any real damages.

In addition to harming the parties, the Accused injured the court system by subjecting it to numerous hearings to sort out the litigation nightmare he created. No fewer than five judges at just the circuit court level ended up hearing the many motions this case eventually engendered, and Judge Beckman endured extremely disrespectful behavior from the Accused.

In sum, the Accused's misconduct harmed everyone who touched it, but particularly his own clients.

4. Preliminary Sanction.

Under the ABA *Standards*, a lawyer who knowingly abuses the legal process is subject to suspension. *Standards* § 6.22.

5. Aggravating and mitigating circumstances.

The trial found the following aggravating factors: vulnerability of the victim (*i.e.*, the Nutts, whom the panel described as "unsophisticated.") (*Standards* § 9.22(h)), and substantial experience in the practice of law (the Accused was admitted to practice in Oregon in 1973). (*Standards* § 9.22(i).)

This court may find additional aggravating circumstances in the Accused's steadfast refusal to acknowledge any wrongful conduct (*Standards* § 9.22(g)), and the pattern of misconduct he demonstrated over a lengthy period of time. (*Standards* § 9.22(c)).

The panel did not consider the Accused's previous reprimand (*see In re Paulson*, 335 Or 436, 71 P3d 60 (2003)) as an aggravating factor because it occurred after

the events relevant to this second proceeding against the Accused. The Bar does not contest that conclusion.

The trial panel found the following mitigating factors: delay in the investigation of the complaint that led to this proceeding (*Standards* § 9.32(j)),[14] and the absence of any evidence that the Accused acted with a dishonest or selfish motive (*Standards* § 9.32(b)).

B. Case law.

There is no Oregon discipline case that exactly mirrors the Accused's conduct as alleged in this proceeding. However, several Oregon cases support the panel's conclusion to conclude that the Accused should be suspended.

In *In re White*, 311 Or 573, 815 P2d 1257 (1991), two chiropractors – former business partners – had a falling out. The accused lawyer engaged in a campaign of litigation on behalf of one chiropractor against the other chiropractor, that included filing repetitious claims; filing claims in different counties when that was not warranted; failing to change venue when venue was not proper; failing to appear at hearings without notice to the court or opposing counsel; and failing to prosecute cases. This conduct was found to violate DR 1-102(A)(4), among other rules. The lawyer also committed some factually unrelated violations, but the court focused on his abuse of the legal

[14] The complaint that led to this disciplinary action was filed by Gensman on April 18, 2000. (Ex. 140.) The Accused was asked to respond by May 31, 2000. The file was referred on June 21, 2001 to the LPRC, which returned its report on August 15, 2002. The case was authorized for prosecution on November 16, 2002, and the Bar's Formal Complaint was filed on January 21, 2003. (Ex. 140.)

system as the primary basis for imposing a three year suspension from the practice of law. The court noted particularly the lawyer's misuse of the legal system to harass the defendant, rather than to resolve his client's legitimate disputes. (*Id.*, at 591.)

Similarly, in *In re Stauffer*, 327 Or 44, 956 P2d 967 (1998), the lawyer relentlessly pursued a former client through various courts in order to collect an attorney fee that continued to grow as the lawyer invested more time in the pursuit. This court found that the accused had used the probate and bankruptcy courts as mere tools in his efforts to pursue his attorney fees claims against the former client. The result was a "staggering amount of unnecessary litigation and the multi-year probate of an essentially no-asset estate, which should have been closed promptly. This conduct violated DR 1-102(A)(4) and it, along with conflict of interest and excessive fee violations, led to the lawyer's two year suspension.

The lawyer in *In re Kluge*, 335 Or 326, 66 P3d 492 (2003), filed an untimely motion to disqualify a trial judge and failed to serve copies of the motion on opposing counsel and the judge against whom the motion was filed. This court found that the accused's conduct prejudiced the procedural functioning of the judicial system by imposing a substantial burden upon both opposing counsel and the trial judge to undo the accused's actions. In part for this misconduct, and also because the lawyer was found to have acted dishonestly and had a prior disciplinary record, the lawyer was suspended for two years. *See, also, In re Gresham*, 318 Or 162, 166, 864, P.2d 360 (1993) (lawyer's conduct that led to an unnecessary burden upon the court was prejudicial to administration of justice and contributed to a 91 day suspension).

In *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995), after a criminal defense attorney's motion to postpone trial was denied, the attorney threatened the judge that he would not put on any defense so as to create reversible error based on ineffective assistance of counsel. The judge felt compelled by this threat to postpone the trial and appoint new defense counsel.

This court found that Jeffery's conduct harmed the orderly process of the court's generally, citing with approval the trial judge's assertion that a lawyer's ethical responsibility to accept the rulings of the court is the glue that holds the legal system together. In addition, the court found harm specific to the criminal case because a continuance was required, new counsel had to be appointed, and time and resources were wasted. Although there were conflict of interest violations present in addition to the DR 1-102(A)(4) charge, much of the nine month suspension imposed by this court appeared to stem from the DR 1-102(A)(4) charge.

Other isolated acts that were held to violate DR 1-102(A)(4) have resulted in terms of suspension from practice. In *In re Meyer*, 328 Or 211, 970 P2d 652 (1999), a lawyer was suspended for 91 days after a DMV hearing had to be reset because he appeared at the hearing drunk. In *In re Thompson*, 325 Or 467, 940 P2d 512 (1997), a lawyer was suspended for 63 days after he confronted and yelled at an appellate judge about a recently issued decision in the courthouse hallway.

Also in *In re Smith*, 316 Or 55, 848 P2d 612 (1993), a lawyer was suspended for 35 days after writing a letter threatening to sue a doctor who was about to conduct a medical evaluation of the lawyer's client. In *In re Rochat*,

295 Or 533, 668 P2d 376 (1983), a lawyer was suspended for 35-days after he acted disrespectfully to court staff because he was unhappy with the number of court-appointed cases he was receiving from the Court. In *In re Paauwe*, 294 Or 171, 654 P2d 1117 (1982), a lawyer was suspended from practice for 30 days after filing a notice of appeal that had no merit and without his clients' consent.

The Accused's misconduct in this proceeding was more than the isolated act or momentary lapse of judgment displayed by the lawyers in *Meyer*, *Thompson* and *Smith*. Rather, the Accused engaged in an extended pattern of reckless, obstructive and offensive acts that were prejudicial to the administration of justice. His misconduct deserves more than a short term suspension.

On the other hand, the Accused's misconduct was not as extreme as the attorneys' in *In re White*, *supra*, (three year suspension) and *In re Stauffer*, *supra*, (two year suspension), although the injury sustained by the Nutts, the opposing parties, and the court was substantial.

After consider the ABA *Standards* and Oregon case law, the Bar respectfully suggests that the Accused be suspended for one year.

VIII. CONCLUSION

The Bar does not dispute that trial lawyers need and should be given considerable latitude in the way they handle their litigation. Strategic decisions by litigators should not be second-guessed, absent unusual or extraordinary circumstances. This case presents just such circumstances. For reasons that apparently had more to do with his own ego and refusal to be "pushed around" by

Gensman, defense counsel, the court, and even his own clients, the Accused transformed a relatively routine civil dispute into a litigation disaster for everyone. His conduct crossed the line between zealous advocacy and out-of-bounds excess, to the detriment of the Nutts, the opposing parties, opposing counsel, and the court.

The Accused engaged in conduct prejudicial to the administration of justice contrary to DR 1-102(A)(4), and should be suspended from the practice of law for a period of one year.

DATED this 22nd day of November, 2005.

OREGON STATE BAR

By: /s/ [Illegible]
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